TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909

No. [redacted].79.

CINCINNATI, NEW ORLEANS AND TEXAS PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

J. SLADE AND E. M. PLESS, COMPOSING THE FIRM OF PLESS AND SLADE.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF GEORGIA.

FILED FEBRUARY 19, 1908.

(21,025.)

(21,025.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1908.

No. 283.

CINCINNATI, NEW ORLEANS AND TEXAS PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

J. SLADE AND E. M. PLESS, COMPOSING THE FIRM OF PLESS AND SLADE.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF GEORGIA.

INDEX.

	Original.	Print.
Writ of error	1	1
Citation and service	3	2
Petition for writ of error	4	2
Allowance of writ of error	6	4
Bond on writ of error	7	4
Assignment of errors	10	5
Bill of exceptions from city court of Cordele	15	7
Verdict returned, &c	15	8
Attachment issued, &c	15	8
Motion to quash return, &c	15	8
Demurrer to motion to quash sustained, &c	16	8
Demurrer to plea to jurisdiction sustained, &c	16	8
Declaration in attachment filed, &c	16	8
Exceptions filed, &c	17	9
Direction by the court, &c	19	10
Specification of parts of record	20	10
Judge's certificate to bill of exceptions	22	11
Acceptance of service of bill of exceptions	22	11
Clerk's certificate to bill of exceptions	23	11

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 29, 1909.

	Original.	Print.
Transcript of record from city court of Corbin	24	12
Writ of attachment	24	12
Affidavit of J. Slade	24	12
Motion to quash attachment	25	13
Affidavit of Edward C. Tomlinson	28	14
Affidavit of M. F. Molloy	32	16
Demurrer to motion to quash	34	17
Answer to motion to quash	34	17
Order sustaining demurrer and dismissing motion to quash	35	18
Plea to jurisdiction	36	18
Demurrer to plea to jurisdiction	46	23
Answer to plea to jurisdiction	47	24
Order sustaining demurrer to plea	48	25
Petition on declaration	49	25
Demurrer to declaration	53	27
Answer to declaration	54	28
Order overruling demurrer to declaration	56	29
Demurrer to answer	57	30
Order sustaining demurrer	57	30
Exceptions to orders sustaining demurrers	58	31
Exception to order overruling demurrer	60	32
Brief of evidence	61	32
Testimony of E. M. Pless	61	32
J. Slade	66	35
G. W. Fullington	67	35
J. R. Mathis	68	36
Plaintiffs rest	72	37
Contract	72	37
Defendant rests	79	41
Section 196 of constitution of Kentucky	79	41
Plaintiffs close	80	41
Motion for verdict for plaintiffs granted	80	41
Judge's certificate to brief of evidence	80	41
Verdict and judgment	81	42
Clerk's certificate	82	42
Opinion	83	43
Judgment	95	48
Clerk's certificate	96	48

1 In the Supreme Court of the United States.

CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY CO.,
Plaintiffs in Error,
v.
PLESS & SLADE, Defendants in Error.

UNITED STATES OF AMERICA:

The President of the United States to the honorable judges of the Court of Appeals of Georgia, Greeting:

Because in the record and proceedings as in also the rendition of the judgment of a plea which is in the Court of Appeals before you, or some of you, being the highest Court of law or equity of the said State in which a decision could be had in the said suit between J. Slade and E. M. Pless, composing the firm of Pless and Slade, and the Cincinnati, New Orleans & Texas Pacific Railway Company, wherein was drawn in question the validity of a statute or authority exercised under the laws of the United States, and wherein the Cincinnati, New Orleans & Texas Pacific Railway Company claimed a title, right, privilege, immunity and exemption under the Constitution and laws of the United States, and the decision was against such claim, and was against the title, right, privilege, immunity or exemption specially set up or claimed under the Constitution and laws of the United States, a manifest error hath happened to the great damage of the said Cincinnati, New Orleans & Texas Pacific Railway Company, as by its complaint ap-
2 pears. We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf do command you that if judgment be therein given, that then under your seal distinctly and openly you send the record and proceedings aforesaid with all things concerning the same to the Supreme Court of the United States together with this writ so that you have the same at Washington within thirty days from the date hereof, in the Supreme Court to be then and there held: that the record and all proceedings aforesaid being inspected, that the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States the 23d day of January, in the year of our Lord One Thousand Nine Hundred and Eight.

[Seal U. S. Circuit Court, N. D. Georgia.]

O. C. FULLER,
Clerk of the Circuit Court of the United States
for the Northern District of Georgia.

Allowed by

BENJAMIN HARVEY HILL,
Chief Judge of the Court of Appeals
of the State of Georgia.

And allowed to operate as a supersedeas on bond for $1000.00.

BENJAMIN HARVEY HILL,
Chief Judge of the Court of Appeals of the State of Georgia.

Filed in office January 23, 1908.
LOGAN BLECKLEY, *C. C. A., Ga.*

3 UNITED STATES OF AMERICA:

In the Supreme Court of the United States.

CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY CO., Plaintiffs in Error,
v.
PLESS & SLADE, Defendants in Error.

To J. Slade and E. M. Pless, composing the firm of Pless & Slade:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States at Washington within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the Court of Appeals of the State of Georgia, wherein Cincinnati, New Orleans & Texas Pacific Railway Company is plaintiff in error, and you are defendants in error, to show cause, if any there be why the judgment rendered against the said plaintiff in error, as in the writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Benjamin Harvey Hill, Chief Judge of the Court of Appeals of the State of Georgia, this the 23rd day of January, in the year of our Lord One Thousand Nine Hundred and Eight.

BENJAMIN HARVEY HILL,
Chief Judge of the Court of Appeals of the State of Ga.

Copy of the within citation received this 23 day of January, 1908, and all other service accepted and waived.

PLESS & SLADE,
By J. T. HILL,
Their Attorneys.

Filed in office January 27, 1908.
LOGAN BLECKLEY,
Clerk Court of Appeals of Georgia.

4 UNITED STATES OF AMERICA, *State of Georgia:*

To the Honorable Benjamin H. Hill, Chief Judge of the Court of Appeals of Georgia:

The petition of the Cincinnati, New Orleans & Texas Pacific Railway Company respectfully shows that on the 15 day of January A. D. 1908, the Court of Appeals of the State of Georgia returned a

final judgment against your petitioner in a certain cause where in Pless & Slade, a firm composed of J. Slade and E. M. Pless, were complainants, and your petitioner was defendant, for $1012.00, and for costs, and directed that the remittitur be sent to the City Court of Cordele for execution in accordance with the judgment theretofore rendered by said City Court as will appear by reference to the records and proceedings in said cause; and that said Court of Appeals is the highest Court of said State in which a decision in said suit could be had; and your petitioner claims the right to remove said judgment to the Supreme Court of the United States by writ of error; your petitioner having in the City Court of Cordele and the Court of Appeals of the State of Georgia relied upon the Constitution and laws of the United States as a full defense to the claim of plaintiffs.

5 Petitioner says that it appears by said judgment and proceedings, and that in said judgment and proceedings in said cause manifest errors were committed to the prejudice of your petitioner because it shows that in said suit rights, privileges and immunities were claimed by petitioner under the Constitution and laws of the United States, and the decision in said suit was against the rights, privileges and immunities specially set up and claimed by petitioner under said Constitution and statutes, as will more fully appear from the record, the special appearance, the motion to quash the attachment filed by petitioner, the plea to the jurisdiction and the answer filed by petitioner, together with the bill of exceptions and assignments of error filed by petitioner under which said cause was appealed from the City Court of Cordele to the Court of Appeals of Georgia. All of which your petitioner prays your Honor to read and consider as a part hereof.

Your petitioner claims the right to remove said judgment to the Supreme Court of the United States by writ of error, under section 709 of the Revised Statutes of the United States, because under section 5258 of the Revised Statutes of the United States, and under the Act of Congress approved February 4th, 1887, entitled An Act to Regulate Commerce, and the acts amendatory thereof, your petitioner claimed and had a title, right, privilege and immunity from interference from the plaintiffs in the court below, Pless & Slade, from suit against your petitioner, and the attachment upon your petitioner's property in the State of Georgia, and the courts of

6 the State of Georgia, including the Court of Appeals by the decision here complained of, decided against such right, title, privilege and immunity, which were specially set up and claimed by petitioner as appears by the record of the proceedings in said cause which is herein submitted.

Wherefore, your petitioner prays allowance of the writ of error returnable in the Supreme Court of the United States, and for citation and supersedeas, and your petitioner will ever pray.

CINCINNATI, NEW ORLEANS AND TEXAS PACIFIC RAILWAY COMPANY, *Petitioner.*

By EDGAR WATKINS,
Attorney for Petitioner.

Let the writ of error issue as prayed to operate as a supersedeas on petitioner giving bond in the sum of $1000.00, which bond has been approved by me this day.

This the 23rd day of January, 1908.

BENJAMIN HARVEY HILL,
Chief Judge of the Court of Appeals of the State of Georgia.

Filed in office January 23, 1908.
LOGAN BLECKLEY,
C. C. A. Ga.

7 In the Supreme Court of the United States.

CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY, Plaintiffs in Error,
v.
PLESS & SLADE, Defendant in Error.

Bond on Writ of Error.

STATE OF GEORGIA, *County of Fulton:*

Know all men by these presents, that we Cincinnati, New Orleans & Texas Pacific Railway Company, as principal, and J. W. English, as surety, are held and firmly bound unto J. Slade and E. M. Pless, composing the firm of Pless & Slade, in the sum of $1000.00 to be paid to the said obligees, their successors, representatives, and assigns, the payment of which well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents, signed with our hands and sealed with our seals this the 22 day of January, 1908.

Whereas, the above named plaintiff in error, hath prosecuted a writ of error in the Supreme Court of the United States to reverse a judgment rendered in the above entitled action by the Court of Appeals of the State of Georgia.

Now therefore, the condition of this obligation is such that
8 if the above named plaintiff in error shall prosecute its said writ of error to effect, and answer all costs and damages, if it shall fail to make good its plea, then this obligation shall be void, otherwise to remain in full force and effect.

CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY CO.,
By J. G. JONES, *Its Agent and Attorney.*

J. W. ENGLISH.

STATE OF GEORGIA, *County of Fulton:*

On this the 22 day of January, 1908, before me personally appeared J. G. Jones, to me known to be the person described in, and who executed the foregoing bond, and acknowledged the same to be

the free act and deed of the Cincinnati, New Orleans & Texas Pacific Railway Company, of which he is the agent and attorney; and that he is authorized as such to execute and acknowledge this instrument for and in behalf of said corporation.

J. G. JONES.

Sworn to — subscribed before me this the 22 day of January, 1908.

[SEAL.] STEWART McGINTY,
Notary Public, Fulton County, Ga.

9 STATE OF GEORGIA,
County of Fulton:

On this 22 day of January, 1908, before me personally appeared J. W. English, to me known to be the person described in, and who executed the foregoing bond and acknowledged the same to be his free act and deed.

J. W. ENGLISH.

Sworn to and subscribed before me this the 22 day of January, 1908.

[SEAL.] STEWART McGINTY,
Notary Public, Fulton County, Ga.

Bond approved January 23, 1908.
BENJ. H. HILL,
Chief Judge, Court of Appeals, State of Georgia.

Filed in office, January 23, 1908.
LOGAN BLECKLEY, *C. C. A. Ga.*

10 In the Supreme Court of the United States.

CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY CO.,
Plaintiff in Error,
v.
PLESS & SLADE, a Firm Composed of E. M. Pless & J. Slade,
Defendants in Error.

Now comes the said plaintiff in error and respectfully submits that in the records, proceedings, decision, and final judgment in the Court of Appeals of the State of Georgia in the above entitled matter there is manifest error in this, to wit:

First. Said court erred in holding that an attachment of a railroad car of plaintiff in error, gave the city court of Cordele jurisdiction to try this cause, plaintiff in error being a corporation not incorporated under the laws of the State of Georgia, and not doing business in the State of Georgia, and said railroad car being at the time it was attached engaged in the business of transporting interstate freight.

Second. Because said Court of Appeals erred in holding that the city court of Cordele did not err in overruling the motion of plaintiff in error to quash the attachment sued out in said city court of Cordele, it appearing that said attachment was levied upon a car belonging to plaintiff in error, which car was when attached being used in the transportation of interstate freight, and it further
11 appearing that plaintiff in error was neither a citizen, inhabitant, resident, or doing business in the State of Georgia; and it further appearing that plaintiff in error had no agent within said State.

Third. Said Court of Appeals erred to the prejudice of this petitioner in sustaining the trial court in holding that it had jurisdiction of plaintiff in error to render the judgment herein complained, such jurisdiction being based only upon the fact of an attachment levied upon a car belonging to plaintiff in error, and which car when attached was engaged in the transportation of interstate freight.

Fourth. Because said Court of Appeals erred to the prejudice of this petitioner in holding that a car sent into the State of Georgia for the purpose of transporting interstate freight, for which purpose plaintiff in error was compelled, under the laws of the United States, to send its car into the State of Georgia, gave authority and jurisdiction to the City Court of Cordele in the State of Georgia, to issue an attachment against said car.

Fifth. Because said Court of Appeals erred to the prejudice of this petitioner in holding that a special appearance made by petitioner for the purpose of quashing the attachment against its property, and for the purpose of setting up its rights under the laws of the United States, gave jurisdiction to the City Court of Cor-
12 dele to hear and determine this cause.

Sixth. Because the said Court of Appeals erred to the prejudice of petitioner in sustaining and not reversing the City Court of the City of Cordele because of its ruling in sustaining a demurrer to the plea to the jurisdiction filed by this petitioner in the City Court of Cordele; such plea having set up rights, privileges, and immunities under the Constitution and laws of the United States, and said City Court by its said ruling in sustaining a demurrer to said plea having decided against such rights, privileges and immunities so set up and especially relied upon by petitioner.

Seventh. Because said Court of Appeals erred to the prejudice of petitioner in sustaining and not overruling the City Court of Cordele in its ruling striking out Section A of Paragraph 5 of the answer of petitioner, in which section petitioner set up its rights under the laws of the United States as an interstate shipper. The shipment involved in this cause, and referred to in said section of the answer of petitioner being an interstate shipment of freight governed by the laws of the United States.

Eighth. Because said Court of Appeals erred to the prejudice of petitioner in sustaining and not overruling the City Court of Cordele in its ruling, striking out Section B of paragraph 5 of the answer of petitioner, in which section petitioner set up its rights

under the laws of the United States as an interstate shipper.
13 The shipment involved in this cause, and referred to in said section of the answer of petitioner being an interstate shipment of freight governed by the laws of the United States.

Ninth. Because said Court of Appeals erred to the prejudice of petitioner in not reversing the City Court of Cordele, and in sustaining the same, because said City Court erred in construing the contract for the transportation of freight sued on herein as a contract governed by the laws of the State of Kentucky, such contract being one for the interstate shipment of freight is governed by the laws of the United States, and said Court of Appeals and said City Court erred in depriving petitioner of its rights, privileges and immunities under the laws of the United States, in not construing said contract as being controlled by said laws, and in construing the limitation of liability of said contract as being void under the laws of the State of Kentucky, such limitations being good under the laws of the United States in existence at the time said contract was made.

Tenth. Because said Court of Appeals erred to the prejudice of petitioner in holding that notwithstanding the point made by the demurrer and plea of this petitioner that the court below was without jurisdiction was properly before said Court of Appeals for decision that the same was not well founded; such decision of the Court of Appeals having determined a federal question, one arising
14 under the laws of the United States against petitioner, and having deprived petitioner of rights, privileges and immunities under the laws of the United States.

Eleventh. Because the Court of Appeals erred to the prejudice of petitioner in holding: "Under the law of Kentucky where the contract was made it was void so far as it attempted to vary the carriers' common law liability" such finding of the Court of Appeals and holding being error in deciding that the contract was one to be governed by the laws of the State of Kentucky, such contract being one of interstate commerce and governed by the laws of the United States.

Wherefore for the above and foregoing errors petitioner in error prays that the judgment of the said Court of Appeals of the State of Georgia be set aside, annulled and reversed, and this case remanded to the City Court of Cordele with instructions to dismiss the same.

EDGAR WATKINS,
Attorneys for Plaintiff in Error.

Filed in office January 23, 1908.
LOGAN BLECKLEY,
C. C. A., Ga.

15 GEORGIA, *Crisp County:*

Be it remembered, that at the regular August Term, 1907 of the City Court of Cordele, there came on to be and was tried in said Court on the 15th day of August, 1907, before his Honor E. F Strozier, Judge of said City Court, and a jury, the case of Pless & Slade, against the Cincinnati, New Orleans and Texas Pacific Rail-

way Company, hereinafter styled the plaintiff in error, the same being an attachment proceeding in said Court and declaration thereon in which cause at said term, a verdict for the plaintiff was returned by the jury by direction of the Court upon a motion therefor by the counsel of record for said Pless and Slade the defendants in error.

Be it further remembered, that the proceedings in said case, which culminated in said verdict and judgment of the Court thereon were begun by the issue of an attachment on the 14th day of May, 1907, returnable to and filed in said Court, the same being levied upon, a certain railway car as the property of the plaintiffs in error.

And be it further remembered, that the plaintiffs in error upon the coming in of said attachment, made its special appearance in said Court and filed its motion in writing, to quash said writ of attachment and dismiss the same upon the ground therein stated, which motion with accompanying affidavit, was filed in said
16 Court on the 12th day of June, 1907, within the time allowed by law.

NOTE BY THE COURT.—The affidavit referred to was not filed with the motion to quash as its date will show, but was offered as evidence upon the hearing before the Court on August 7th, 1907. It was objected to on the ground that it was irrelevant, immaterial and inadmissible. The objection was sustained and the affidavit excluded

E. F. STROZIER,
J. C. C. C.

And be it further remembered, that the defendants in error filed their demurrer in writing to the motion to quash, on July 26th, 1907, and the same came on to be and was heard at the June Term, 1907, of said Court on the 7th day of August, 1907, during said Term, when said demurrer was sustained and said motion to quash was dismissed.

And be it further remembered, that on the 3rd day of August, 1907, and during said June Term of said Court, and within the time allowed by the law, the plaintiffs in error filed in said Court in said case, its plea to the jurisdiction of said Court to entertain said case on the grounds therein stated, to which plea the defendants in error filed their demurrer on August 7th, 1907, and after the argument heard, the same was sustained and said plea to the jurisdiction was stricken.

And be it further remembered, that on July 26th, 1907, the defendant in error filed its declaration in attachment in said Court, and that on the 7th day of August, 1907, during said June Term
17 of the *of the* Court and within the time allowed by law, the plaintiff in error filed its demurrer to said declaration on attachment and its answer to said declaration and that on said 7th day of August, the same came on to be heard. The Court after argument, overruled said demurrer to said declaration on said attachment so filed by the plaintiff in error, and sustained a demurrer then and there filed by the defendant in error to the answer of the

plaintiffs in error and ordered paragraphs "B" and "C" said answer to said declaration in attachment to be stricken.

NOTE BY THE COURT.—The demurrer was sustained only as to paragraphs "B" and "C" of defendant's answer.

E. F. STROZIER,
J. C. C. C.

And be it further remembered, that on the 12th day of August, 1907, during said June Term of said Court, and within less than the time allowed by law, the plaintiff in error filed in said Court, its exceptions *pendente lite* to the orders of the Court, sustaining the defendant in error's demurrer to the plaintiff in error's motion to quash the writ of attachment on the ground therein stated, which exceptions *pendente lite* were duly certified by the Court, on August 7th, 1907, and ordered filed, and were filed as a part of the record in said case.

And be it further remembered, that on August 12th, 1907, and within less than the time allowed by law, the plaintiff in error filed in said Court, its exceptions *pendente lite* to the order of the Court,
sustaining the demurrer of the defendant in error to the
18 plea to the jurisdiction filed, by the plaintiff in error, on the ground therein stated, which exceptions *pendente lite* were on the 7th day of August, 1907, and within less than the time allowed by law, duly certified by the Court and ordered filed as a part of the record in said case.

And be it further remembered, that on the 12th day of August, 1907, and within less than the time allowed by law, the plaintiff in error filed its exceptions *pendente lite* to the order of the Court, overruling the demurrer of the plaintiff in error to the original declaration on the grounds therein stated, which exceptions *pendente lite* were on the 7th day of August, 1907, within less than the time allowed by law, duly certified by the Court, and ordered filed as a part of the record in said case.

And be it further remembered, that on the 12th day of August, 1907, and within less than the time allowed by law, the plaintiff in error filed its exceptions *pendente lite* to the order of the Court, sustaining the demurrer of the defendant in error, to the answer filed by the plaintiff in error, to the original declaration in attachment in said case, which exceptions *pendente lite* were on the 7th day of August, 1907, and within less than the time allowed by law, duly certified by the Court, and ordered filed as a part of the record in said case, the plaintiff in error specifically avers that the Court
19 erred in passing each and all of said orders, to which said exceptions *pendente lite* were so filed, and hereby in this bill of exceptions and within less than the time allowed by law, assigns error thereon separately and collectively and says, that the Court should have sustained its motion to quash said writ of attachment, and should have sustained its plea to the jurisdiction upon a trial thereof, and should have sustained its demurrer to the original

declaration in attachment, and should not have stricken its answer upon demurrer thereto, because its motion to quash was well founded in fact, and, in law; its plea to the jurisdiction was well founded in fact and in law; the original declaration in attachment of the original declaration in attachment of the original plaintiff, was demurrable upon the grounds of which exceptions was taken thereto, and because its answer to said declaration and attachment set forth a valid and subsisting defense in fact and in law thereto.

And be it further remembered, that at the August Term of said Court, upon the trial of the merits under the pleadings then left in the case upon the coming in of the evidence as set forth in the approved brief of the evidence in said case which was stenographically reported, has been duly briefed and approved by the Court as being correct which is now certified to be a true and correct brief of all the oral and documentary evidence submitted by either side in said cause, the Court so directed a verdict in favor of the original plaintiff against these plaintiffs in error, for the full amount
20 sued for and entered up judgment therefor over the protest of the plaintiff in error, that there was issue of fact for determination by the jury to wit: The question of whether or not, under the evidence the plaintiff was entitled to recover, if so, what amount, it being a suit for the recovery of alleged damages which were unliquidated and the plaintiff in error specifically avers that the Court erred in so directing the jury to find as aforesaid and in entering judgment thereon.

[NOTE BY THE COURT.—After argument on the motion to direct a verdict the Court enquired of counsel for plaintiff and defendant *where* or not there was any dispute as to the amount of damage and being informed by counsel for both sides that there was none directed verdict for plaintiff.

E. F. STROZIER, *J. C. C. C.*]

The plaintiff in error specifies as those parts of the record, material to a clear understanding of the errors complained of, and avers that none other are so material, the following to wit:

1st. The original attachment with affidavit upon which the same was based, omitting attachment bond and levy.

2nd. Special appearance, motion to quash and accompanying two (2) affidavits filed by the original defendant.

3rd. The plaintiff's demurrer thereto, and order of the Court thereon of date, August 7th, 1907.

4th. The original defendant's plea to the jurisdiction with
21 affidavit thereto.

5th. The plaintiff's demurrer thereto and order of the Court thereon, of date August 7th, 1907.

6th. The plaintiff's declaration on attachment omitting filing.

7th. The defendant's demurrer thereto and order of the Court, August 7th, 1907, overruling the same.

8th. The defendant's answer omitting filing.

9th. The plaintiff's demurrer thereto and order of the Court, August 7th, 1907, sustaining the same.

10th. The exceptions *pendente lite* filed by the plaintiff in error above referred to, together with the certificate of the Court thereto, and entry of filing.

11th. The brief of the evidence, together with the approval of the Court thereon, and the direction therein contained to the jury to return a verdict for the plaintiff for the full amount sued for in said case.

12th. The verdict of the jury.

13th. The judgment of the Court upon said verdict.

Wherefore, now within less than the time allowed by law, the plaintiff in error comes and presents to his honor said trial Judge, this its Bill of Exceptions and prays that the same may be signed and certified as provided by law, that the errors alleged to have been committed, may be considered and corrected.

22 This August 29th, 1907.

CRUM & JONES.

Attorneys of Record for the Plaintiffs in Error.

P. O. Address, Cordele, Ga.

I do certify that the foregoing Bill of Exceptions is true, and specifies all of the evidence and all of the record material to a clear understanding of the errors complained of, and the clerk of the City Court of Cordele, is hereby ordered to make out a complete copy of such parts of the record in said case, as are in this Bill of Exceptions specified and certify the same as such, and cause the same to be transmitted to the October Term, 1907, of the Court of Appeals, of the State of Georgia. That the errors alleged to have been committed, may be considered and corrected.

This Sept. 9th, 1907.

E. F. STROZIER.

Judge of the City Court of Cordele.

Due and legal service of the within Bill of Exceptions and certificate of the Judge thereto is hereby acknowledged, copy, and all other and further notice and service waived.

This 9th day of Sept. 1907.

HILL & ROYAL.

Attorneys for Pless & Slade, Defendants in Error.

P. O. Address, Cordele, Ga.

Filed in office Sept. 9th, 1907.
J. A. LITTLEJOHN.

23 GEORGIA, *Crisp County:*

I, J. A. Littlejohn, Clerk of the City Court of Cordele, do hereby certify, that the within and foregoing, is the Original Bill of Exceptions, as filed in the case as stated.

Witness my official signature and the seal of said Court this September 12th, 1907.

[OFFICIAL SEAL.] J. A. LITTLEJOHN,
Clerk City Court of Cordele.

(Endorsed:) Case No. 758. Court of Appeals of Georgia. October Term, 1907. Cincinnati, N. O. & T. P. Ry. Co., *versus* Pless & Slade. Bill of Exceptions. Filed in office Sept. 14, 1907. Logan Bleckley, C. C. A., Ga.

24 GEORGIA, *Crisp County:*

To all and singular the Sheriffs and constables of said State:

You are hereby commanded to attach*ed* and seize so much of the property of the Cincinnati, New Orleans & Texas Pacific Railway, as will make the sum of One Thousand and Twelve Dollars ($1012.00), and all costs, and also to serve such summons of garnishments as may be placed in your hands, and that you make return of this attachment, with your actings and doings entered thereon, to the June Term, 1907, of the City Court of Cordele, of said County, to which Court this attachment is hereby made returnable.

Hereof fail not.

Witness my hand and seal, this the 11th day of May, 1907.

J. B. SMITH,
N. P., ex-Off. J. P.

GEORGIA, *Crisp County:*

Personally appeared before me, J. B. Smith, Notary Public and *Ex Off.* Justice of Peace, J. Slade, who on oath says, that he is a member of the firm of Pless & Slade, the members of said firm being the said J. Slade and E. M. Pless; that the Cincinnati, New Orleans & Texas Pacific Railway is indebted to the said firm in the sum of Ten hundred and Twelve Dollars ($1012.00), and that the said Cincinnati, New Orleans & Texas Pacific Railway resides without the State of Georgia.

J. SLADE.

25 Sworn to and subscribed before me this the 11th day of May, 1907.

J. B. SMITH,
N. P., ex-Off. J. P.

GEORGIA, *Crisp County:*

Attachment, etc., in City Court of Cordele, June Term, 1907.

PLESS & SLADE
vs.
C., N. O. & T. P. RY.

Special Appearance.

Motion to Quash Attachments.

And now comes the defendant, Cincinnati, New Orleans and Texas Pacific Railway, by its Attorneys Crum & Jones, and enters this its Special Appearance in the above stated case, and presents this its motion, to quash the attachment issued in said case, and for the grounds of its motion says:

1st.

That it is a non-resident steam railroad company, and is incorporated under the laws of the State of Ohio. That it has
26 no agent, office or place of business, nor does it transact in any wise, business in the State of Georgia.

2nd.

That the box car levied upon, and seized under and by virtue of the attachment, issued in the above stated case, is the property of defendant, and that said car was loaded with freight outside of the State of Georgia, and was used in the transportation of such freight to the point of destination, to-wit: Cordele, Georgia, and then after unloading, said car was to be returned either loaded or empty, to this defendant, the owner of said car, to its line of railroad outside of the State of Georgia, pursuant to agreement between this defendant and the transportation companies, for the continuous carriage of interstate shipments of freight as authorized by Rev. St. of the U. S. Section 5258, and in conformity to the policy of the Statutes regulating interstate commerce.

3rd.

That such car is not subject to attachment under the laws of the State of Georgia, into which it was carried, by connecting railroad companies, and that the City Court of Cordele, acquires no jurisdiction of the defendant, or of its property, for the reason that this defendant is, and was when the proceedings were commenced, a corporation created and existing under the laws of the State of Ohio, and that it does not, and did not own or operate any railroad
27 in the State of Georgia, and did no business, and had no office or agent in said State of Georgia, and that said car which was seized by levy of the attachment issued in this case, was loaded with freight upon defendant's line of railroad, outside of the State of Georgia, to be carried without change of cars to point — the

State of Georgia, and *were* delivered to its destination by and through defendant's connecting carriers.

4th.

That said car was sent into the State of Georgia, by said defendant as an instrument of interstate commerce, and therefore, is not subject to the attachment issued in this case, nor has the City Court of Cordele, any jurisdiction of this defendant, or its property.

Wherefore, defendant moves the Court to quash the writ of attachment issued in the above stated case, and upon the grounds stated and as provided by the Statutes of the United States regulating interstate commerce.

Respectfully submitted,

CRUM & JONES,
Attorneys for Defendant.

28 *Affidavit of Edward C. Tomlinson.*

STATE OF OHIO,
County of Hamilton, ss:

Edward C. Tomlinson, being first duly sworn, makes oath and says that he is the Superintendent of Transportation of The Cincinnati, New Orleans & Texas Pacific Railway Company, which company is named as defendant in the above entitled cause; that as such Superintendent of Transportation it is a part of his duty to keep a record of the movement of all cars belonging to said company, whether on the line of the road of said company or on the line of other roads, and likewise to keep a record of the movement of all cars on the line of the road of said company, whether belonging to said company or to other companies and likewise it is a part of his duty to take such steps as are practicable to see that all cars of said company in possession of other companies are returned to said company as soon as reasonably practicable; and that the interchange of cars between the various railroads of the United States and the use which such railroads may make of cars belonging to other companies are governed by the Car Service and Per Diem Rules of the American Railway Association; that The Cincinnati, New Orleans & Texas Pacific Railway Company and substantially all of the railways in the United States are members of the American Railway Association and have agreed to abide by the
29 rules of said Association and, as a general rule, do substantially abide by and comply with said rules; that by the said rules it is provided that cars belonging to companies other than the one operating the road upon which said cars are, which are commonly called "foreign" cars, may properly be used only by loading the same with freight to be transported to points on or reached over the line of the company to which such cars belong, or by loading the same with freight to be transported to points in the direc-

tion of or reached through the junction point at which such cars were received by the company loading the same. Affiant says that any other use of said cars than as hereinbefore stated is improper and a misuse thereof.

Affiant further says that the car attached in this case, being a car of the Cincinnati, New Orleans & Texas Pacific Railway Company numbered 12098 and being a box car, was, as shown by the records in the affiant's office, delivered loaded by the Nashville, Chattanooga & St. Louis Railway Company to the Central of Georgia Railway Company on the 6th day of May, 1907, and by the Central of Georgia Railway Company likewise delivered loaded to the Georgia Southern & Florida Railway Company on the 7th day of May, 1907. Affiant is informed, and from the records in his office believes, that the said car was loaded with freight to be transported from Nashville, Tennessee, to Cordele, Georgia, the same being an interstate movement, and that the proper course for the Georgia Southern & Florida Railway Company to pursue with said
30 car when the same was unloaded was to load the same to some point upon or reached by or over the line of The Cincinnati, New Orleans & Texas Pacific Railway Company, and that in case such loading was impracticable, then and in such event only the proper course was to load to some point in the direction of or reached through Macon, Georgia, the same being, as affiant is informed and believes, the junction point at which said car was delivered by the Central of Georgia Railway Company to the Georgia Southern & Florida Railway Company, and that any other use of said car was an improper use not permitted by the rules of the American Railway Association under which the said car was received by the Georgia Southern & Florida Railway Company, which company is likewise a member of the American Railway Association and has likewise agreed to be bound by said rules.

Affiant further says that by said rules it is likewise provided, as the same were in force in May 1907, that the railroad company in possession of a car belonging to another road shall pay for the same at the rate of 25 cents per day, and that after such car has been in the possession of any railroad company for the term of twenty days, upon the company owning such or giving notice to the railroad company having the same, the same should be returned, then after ten days from the time such notice is given the rate to be charged to the road having such car is increased to the sum of one dollar per day, the same being intended as a penalty to compel the
31 prompt return of cars.

Affiant attaches to his affidavit as a part hereof a copy of Car Service and Per Diem Rules of the American Railway Association.

Affiant therefore says that at the time said car was attached, at which time affiant is informed and believes said car was in possession of the Atlanta, Birmingham & Atlantic Railroad Company, the said Atlanta, Birmingham & Atlantic Railroad Company had no right to possession thereof under said rules, it having been the duty of the Georgia Southern & Florida Railway Company under said

rules, after said car was unloaded, to cause the same to be reloaded with freight destined for some point to be reached via local line of the Cincinnati, New Orleans & Texas Pacific Railway Company or in the direction of Macon as aforesaid, and not to deliver the same to the said Atlanta, Birmingham & Atlantic Railroad Company.

Further Affiant saith not.

EDWARD C. TOMLINSON.

Sworn to before me and subscribed in my presence, this 5th day of July, 1907.

EUGENE BRUNSMAN,
Notary Public, Hamilton County, Ohio.

32 *Affidavit of M. F. Molloy.*

STATE OF OHIO,
Hamilton County, ss:

M. F. Molloy, being first duly sworn, makes oath and says that he is Comptroller of The Cincinnati, New Orleans & Texas Pacific Railway Company, named as defendant in the above entitled cause; that said company is a corporation created and existing under the laws of the State of Ohio and of no other State; that it operates, as lessee, the Cincinnati Southern Railway, extending from Cincinnati in the State of Ohio, through the States of Kentucky and Tennessee; that it does not now own and never has owned any railroad in the State of Georgia; that it does not do and never has done any business in said State, and that it has and had no officer or agent in said State upon whom process could be served, and that no process has been served upon it in the above entitled cause in the State of Georgia; that the car attempted to be attached in this cause was delivered to the Georgia Southern & Florida Railway Company to be by it used in the transportation of freight from Nashville, Tennessee, to Cordele, Georgia, the same being points in different States, and said transportation being transportation of property among the several States, and that the said Georgia Southern & Florida Railway Company had the right to use said car in the transportation of property in the regular *of* course of business while returning said car
33 to this defendant, and not otherwise, as more in detail set out in the affidavit of Edward C. Tomlinson which affiant has read and with the contents of which he is familiar.

Further Affiant saith not.

M. F. MOLLOY.

Sworn to before me and subscribed in my presence, this 5th day of July, 1907.

EUGENE BRUNSMAN,
Notary Public, Hamilton County, Ohio.

34 Attachment, etc., City Court of Cordele, June Term, 1907.

PLESS & SLADE
vs.
C., N. O. & T. P. RAILWAY.

Demurrer to Motion to Quash.

And now comes the plaintiffs, and by their Attorneys, file this their demurrer to the motion of defendant to quash the attachment, and for cause of said demurrer, says:

1st.

Said motion sets out no such grounds as would authorize the Court to quash said attachment;

Wherefore, Plaintiffs pray that said motion be denied and dismissed.

They will ever pray, etc.

HILL & ROYAL,
Plaintiffs' Attorneys.

Answer to the Motion to Quash.

In answer to the allegations set out in defendant's motion to quash the attachment, plaintiffs say:

1st.

For want of sufficient information, plaintiffs can neither
35 admit nor deny the allegations as made in Paragraph One, Two and Three.

2nd.

Plaintiffs deny the allegations in Paragraph Four of said motion.

3rd.

Further answering, plaintiffs deny the allegations in Paragraph Three, to the effect that the car attached was not subject to attachment, or that the City Court of Cordele acquires no jurisdiction of defendant or its property;

Wherefore, Plaintiffs pray that said motion be denied and dismissed.

HILL & ROYAL,
Plaintiffs' Attorneys.

Attachment, etc., City Court of Cordele, June Term, 1907.

PLESS & SLADE
vs.
C., N. O. & T. P. RAILWAY COMPANY.

Demurrer to the Motion to Quash.

After argument, it is ordered, considered and adjudged that the within demurrer be and it is hereby sustained and the motion to quash dismissed.

This 7th day of August, 1907.

E. F. STROZIER,
J. C. C. C.

HILL & ROYAL,
Plaintiffs' Attorneys.

36 In City Court of Cordele, Crisp County, Georgia, June Term, 1907.

No. —.

PLESS & SLADE
vs.
C., N. O. & T. P. RY. CO.

Plea to Jurisdiction.

And now comes the Cincinnati, New Orleans & Texas Pacific Railway Company, the corporation named as defendant in the above stated case, and appearing therein only for the purpose of pleading to the jurisdiction of said Court, to maintain the above stated action, against it, or to render any judgment thereon, pleads to the jurisdiction of said Court and for such plea, to the jurisdiction shows:

(I.)

That it is a corporation chartered, organized and existing under the laws of the State of Ohio, with its residence in the City of Cincinnati, in said State of Ohio, that its railway line and tracks do not extend into the State of Georgia.

(II.)

That the above stated cause, had not been brought by petition and process, and that no process has been issued against nor any service of process made or attempted to be made upon this defendant.

(III.)

That this attachment has been brought by attachment against this defendant, in which said attachment this defendant is al-
37 leged to be a non-resident of the State of Georgia, and which as aforesaid is a corporation of the State of Ohio.

(IV.)

That said attachment has been levied by seizure of a certain freight box car, #12098 that said car was in the custody of the Atlanta, Birmingham and Atlantic Railroad Company, a corporation created and existing under the law of the State of Georgia, said levy and seizure of said car #12098 being made by H. F. Musselwhite, Deputy Sheriff of said Crisp County, on the 11th day of May 1907.

(V.)

That the said Atlanta, Birmingham & Atlantic Railroad Company, had in its control said car #12098 at the time of the levy of said attachment as an instrument of Interstate Commerce and was in the act of returning said car to this defendant according to Car Service Rules and Per Diem Rules of the American Railway Association.

(VI.)

That said car belonging to this defendant to-wit #12098 came into the hands of said Atlanta, Birmingham & Atlantic Railroad Company, and was in its possession at the date of the levy of said attachment under the following facts and circumstances: said car was loaded with freight and delivered loaded by the Nashville, Chattanooga, & St. L. Railway Company, to the Central of Georgia Railway Company, on the 6th day of May, 1907, by the Central of
38 Georgia Railway Company, likewise delivered loaded to the Georgia Southern & Florida Railway Co., on the 7th day of May 1907: said car was loaded with freight to be transported from Nashville Tennessee to Cordele Ga., the same being an interstate movement and that said car when unloaded was to be reloaded or returned empty to some point upon or reached by or over the line of the Cincinnati, New Orleans & Texas Pacific Railway Company, and that in case such loading was impracticable then, and in such event the car was to be loaded to some point in the direction of or reach through Macon, Ga., the same being the junction point at which said car, was delivered by the Central of Georgia Railway Company to the Georgia Southern & Florida Railway Company, and hence delivered by rules of transfer over transfer tracks at Cordele Georgia to Atlanta, Birmingham and Atlantic Railroad Company, for the purpose of being unloaded, said car passing over the Nashville, Chattanooga & St. L. Railway, from Nashville to Chattanooga in the State of Tennessee, over the Western & Atlantic Railroad Company from Chattanooga in the State of Tennessee to Atlanta in the State of Georgia and over the Central of Georgia Railway Company, and Georgia Southern & Florida Railway Company from Atlanta to Cordele in the State of Georgia, pursuant to the routing of said car, it was in due course delivered in due time at Cordele Ga., to the Atlanta, Birmingham & Atlantic Railroad Company, on said 11th day of May 1907, shortly after receipt at Cordele of said
39 car routed as aforesaid before said Atlanta, Birmingham & Atlantic Railroad Company, had had the time and opportunity to unload and deliver said car to its connecting lines,

said car was seized as aforesaid by levy of the attachment as aforesaid, at the instance of the plaintiffs in attachment said car belonging to this defendant while the same was actually engaged in the shipment of freight from Nashville in the State of Tennessee to Cordele in the State of Georgia.

(VII.)

That the Cincinnati, New Orleans & Texas Pacific Railway Company, is a foreign corporation and both said Company and Atlanta Birmingham & Atlantic Railway Company were common carriers of freight and passengers, that at the time of the issue of the attachment and the levy of same and the seizure under such levy of said car, and ever since said time an arrangement and understanding existed between this defendant, the said Nashville, Chattanooga & St. Louis Railway Company, Central of Georgia Railway Company, Georgia Southern & Florida Railway Company and Atlanta Birmingham & Atlantic Railroad Company, agreeing to the Universal custom in such cases among Railroad lines throughout the United States in the management of their freight business, by which instead of unloading and transferring their freight from cars of one company to the cars of another company at point of connection which company receives the loaded cars of the other from connecting lines or direct, hauls them to the place of destination on its own line, or to the point of delivery to connecting
40 lines, and after the freight is discharged and existing agreement is implied, to return them as soon as and when practicable, in the due course of business, reloading with freight consigned to some point on, or near by or reached by the line of the company owning them.

(VIII.)

That under the arrangement and understanding existing as aforesaid, the Atlanta, Birmingham & Atlantic Railway Company had the right to use in its business the car aforesaid, its own cars while on the lines of the Cincinnati, New Orleans & Texas Pacific Railway Company, being similarly in current constant use by the Cincinnati, New Orleans & Texas Pacific Railway Company at all times and each company paying to the other per diem for such cars, and said Atlanta, Birmingham & Atlantic Railroad Company, was acting under said agreement and understanding and furnished its cars to the said Cincinnati, New Orleans & Texas Pacific Railway Company thereunder, and had, and has a vested right in said Cincinnati, New Orleans & Texas Pacific Railway Company, car Number 12098 heretofore described, and the same was not subject to seizure by levy of attachment while in the hands of the said Atlanta, Birmingham & Atlantic Railroad Company.

(IX.)

That under the agreement and understanding existing as aforesaid, the Atlanta, Birmingham & Atlantic Railroad Com-
41 pany in whose hands said car was at the time of seizure under said levy of attachment, was to deliver said car num-

ber 12098 empty or loaded for transportation to points on or reached by defendant's line of road, had the right to use in its business said car number 12098, the cars of said Atlanta, Birmingham and Atlantic Railroad Company while on the lines of the Cincinnati, New Orleans & Texas Pacific Railway Company being similarly in current constant use by said Cincinnati, New Orleans & Texas Pacific Railway Company at all times, and each company paying per diem for such cars; that said Atlanta, Birmingham & Atlantic Railroad Company has acted under said agreement and understanding and furnish its cars to said Cincinnati, New Orleans & Texas Pacific Railway Company thereunder, and was entitled to the use of said car number 12098 to be reloaded and returned to points on or reached by the Cincinnati, New Orleans & Texas Pacific Railway Company, and the said car therefore was not subject to seizure under levy of attachment.

(X.)

The method aforesaid of receiving and returning railroad cars of other lines by railroads facilitates traffic and is a great accommodation to the shipping public, and has become a part of the general system of freight transportation throughout the United States; that it would be practicably impossible for this defendant to carry on its business without arrangements and understanding of this character with other lines and that the Atlanta,
42 Birmingham & Atlantic Railroad Company, under the arrangements and understanding aforesaid, is entitled to use and hold as aforesaid, the car for said business free and discharged of and without interference from attachments or proceedings herein, and that the maintenance of such proceedings would nullify the rights of the Atlanta, Birmingham and Atlantic Railroad Company, with the defendant under the arrangement and understanding aforesaid, and interfere seriously with the proper movement of traffic and the accommodation of the shipping public.

(XI.)

This defendant avers: that said car was not subject to seizure under said attachment, while the same was in the hands of the said Atlanta, Birmingham & Atlantic Railroad Company, but that the rights of said Atlanta, Birmingham & Atlantic Railroad Company to the control of said car under said contract, was superior to those of the attaching creditors, and that said car can not be seized under and by virtue of said attachment.

(XII.)

That this defendant is a corporation created and existing under the laws of the State of Ohio, and of no other State, and that it operates as lessee the Cincinnati Southern Railway extending from Cincinnati in the State of Ohio through the States of Kentucky and Tennessee to Chattanooga in the State of Tennessee, and likewise operates various branches and industrials tracks situated in the States of Kentucky and Tennessee, that it does not now own, and

never has owned any railroad in the State of Georgia that
43 it does not do, and never has done any business in said State of Georgia, and that it has and had no office, or agent in said State of Georgia, upon which process could be served, and that no process has been served upon it in the above entitled cause, in the State of Georgia.

(XIII.)

That the seizure of said car under said attachment is in violation of the Constitution and laws of the United States in reference to Interstate Commerce, and for that reason is void. That such attempted use of the attachment laws of the State of Georgia would in this instance operate to infringe upon the exclusive power of the United States government as to Interstate Commerce, and the suing out, levy and seizure of said car, under and by virtue of said attachment is void and of no effect, and this defendant draws in question the authority exercised under the laws of the State of Georgia, by said seizure under said attachment on the ground that said seizure under said attachment under the circumstances aforesaid is repugnant to Article "I" Section "8" Paragraph "3" of the Constitution of the United States and to the several Acts of Congress relating to interstate commerce, and so makes a federal question herein.

(XIV.)

That — is impossible for this defendant to carry on its public busi-
ness as a common carrier, or to perform its duties under the
44 laws of a common carrier, if its rolling stock or the rolling stock in use by it, whether upon its own track or upon the tracks of other railroads, can be levied on or seized under attachment, garnishment and other legal process, or sold or disposed of other than an integral part of its railroad, and it therefore submits that said seizure under process of attachment is contrary to public policy and void.

(XV.)

This defendant further avers that the said car passing into the State of Georgia, in the course of Interstate Commerce, as aforesaid, and under the arrangements above set forth, existing between itself and the other said connecting carriers engaged in Interstate Commerce are not personal property of this defendant located within the State of Georgia subject to seizure and sale within the meaning of the attachment laws thereof; that so far as the same are in the State of Georgia they constitute for the time being a part of the rolling stock of the several railroads using the same under the arrangement aforesaid, and when so ceasing to constitute such rolling-stock they are property outside of the State of Georgia, and not subject to seizure under process in the Court of said State.

(XVI.)

This defendant avers further that said car above mentioned was
all of the property, and the only property in which it has any
45 interest whatsoever, or was in any way seized under said attachment and that said seizure under said attachment being

null and void, this court has acquired no jurisdiction of any property of this defendant, and hath none of the person of this defendant and therefore has no jurisdiction to proceed to judgment in this cause.

(XVII.)

This defendant avers further that the courts having jurisdiction of the subject matter of this suit and of the person and property of this defendant, and in which the claim of plaintiff in attachment, if any they have, can be enforced and proceed to judgment, are the superior court of Cincinnati, the State of Ohio the circuit courts of the State of Ohio.

Wherefore, appearing only for the purpose of presenting this plea to the jurisdiction of said Court, and in no wise submitting itself to the general jurisdiction thereof, protesting against said jurisdiction, this defendant tenders this its plea, all of which it is ready to verify.

Wherefore it prays judgment that it be hence discharged upon the ground of want of jurisdiction in this Court.

CRUM & JONES,
Attorneys C., N. O. & T. P. Ry. Co.

46 GEORGIA, *Crisp County:*

Personally appeared before the undersigned officer J. Gordon Jones, who on oath says that he — attorney at law for the Cincinnati, New Orleans & Texas Pacific Railway Company, and that the facts stated in the foregoing plea are true.

J. GORDON JONES.

Sworn to and subscribed to before me this 2nd day of August, 1907.

J. A. LITTLEJOHN, *C. S. S.*

Attachment, etc., City Court of Cordele, June Term, 1907.

PLESS & SLADE
vs.
C., N. O. & T. P. RAILWAY COMPANY.

Demurrer to Defendants' Plea to the Jurisdiction of the Court.

Now come the plaintiffs in the above stated cause and demur to the plea filed by the defendants to the jurisdiction of this Court, and for cause of such demurrer says:

1st.

Said plea sets out no sufficient reason in law why this Court has not jurisdiction in said case under the Statutes of the State
47 of Georgia.

2nd.

Said plea to the jurisdiction fails to set out what Court has jurisdiction over the defendants in the above stated case, or in what Court said defendants can be sued by plaintiffs, under the facts alleged in said case;

Wherefore, plaintiffs pray that said plea be dismissed.
They will ever pray, etc.

HILL AND ROYAL,
Plaintiffs' Attorneys.

Answer to the Plea to the Jurisdiction Filed by Defendants.

And now come the plaintiffs and answering the plea to the jurisdiction filed by defendants in the above stated cause say:

1st.

For want of sufficient information, plaintiffs can neither admit nor deny paragraph one.

2nd.

Plaintiffs admit the allegations in paragraph two.

3rd.

Plaintiffs admit the allegations in paragraph three except
48 that portion of said paragraph which alleges that defendants are a corporation of the State of Ohio, and for want of sufficient information they can neither admit nor deny that portion of said paragraph.

4th.

The allegations in paragraph four are admitted.

5th.

The allegations in paragraphs five, six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen, fifteen, and sixteen, are denied.

6th.

Plaintiffs decline to answer paragraph seventeen of said plea, upon the ground that said paragraph alleges nothing.

Respectfully submitted.

HILL & ROYAL,
Plaintiffs' Attorneys.

Attachment, etc., City Court of Cordele, June Term, 1907.

PLESS & SLADE
vs.
C., N. O. & T. P. RAILWAY COMPANY.

After argument, the within demurrer is hereby sustained. This 7th day of August, 1907.

E. F. STROZIER, *J. C. C. C.*

HILL & ROYAL,
Plaintiffs' Attorneys.

49 GEORGIA, *Crisp County:*

To the City Court of Cordele

The petition of Pless & Slade shows to the Court the following facts:

1st.

The Cincinnati, New Orleans & Texas Pacific Railway Company, hereinafter referred to as "The Company," is a non-resident railroad corporation.

2nd.

Said Company is indebted to the petitioners in the sum of One Thousand and Twelve Dollars ($1012.00), as will appear from the facts hereinafter related.

3rd.

At 7.45 O'clock on March 1st, 1906, said Company received and accepted at Wilmore, in the State of Kentucky, a carload of horses for the purpose of transporting the same from said Wilmore in the State of Kentucky, to Cordele, Georgia, and there deliver the same to the petitioners for a consideration of One Hundred and Twenty-Nine Dollars ($129.00) freight charges, which the petitioners agreed to pay, and did pay, at Cordele, Georgia, upon the delivery of the horses.

4th.

50 By the use of such care and diligence as the law requires, the Company should have carried the car of horses from Wilmore, Kentucky, to Cordele, Georgia, and delivered the same to the petitioners on the 3rd day of March 1906, after having fed them twice while en route.

5th.

But said Company handled and carried said horses in such a careless and negligent manner that same were negligently delayed and were not delivered to the consignee at Cordele Georgia until 7 o'clock P. M. on March 6th, 1906.

6th.

Said Company kept said car of horses in car on its line between Wilmore, Kentucky, and Chattanooga, Tennessee, from 7:45 P. M. on March 1st, 1906, until 2:30 o'clock P. M. on March 3rd 1906, when the same were delivered to the said Company's agents and connections at Chattanooga and was not unloaded and fed until 6 o'clock A. M. on March 3rd, 1906.

7th.

Said Company then caused the said horses to be reloaded at 8:30 o'clock A. M. on March the 3rd, 1906 and carried to Atlanta, Georgia, where the same were kept in the car and not unloaded and fed until 6:20 o'clock P. M. on March 4th 1906.

8th.

The said Company then caused the said horses to be re-
51 loaded at Atlanta Georgia, at 6:20 o'clock P. M. on March 4th 1906, and on account of the negligent and careless manner in which it handled and carried said horses they were not delivered at Cordele Georgia until 7 o'clock P. M. on March 6th 1906, after having incurred the expense of an extra feed bill of Ten Dollars ($10.00) and a charge of Two Dollars ($2.00) for unloading and reloading—which sums the petitioners were required to pay before the delivery of said horses, to the injury and damages of said petitioners in said sums.

9th.

It was the duty of the said Company to carry and deliver the said horses from Wilmore, Kentucky, to Cordele, Georgia, in a safe manner, but nevertheless said horses were handled in such a careless and negligent manner by the said Company, its agents and employees, as to cause the death of one horse of the value of Three Hundred Dollars, ($300.00); also of one horse of the value of One Hundred and Seventy Five Dollars ($175.00); also the injury of one mare in three legs to the extent of One Hundred Dollars ($100.00); also the injury of one horse in both hind legs to the extent of Fifty Dollars ($50.00); also the injury of one horse internally, by mashing, to the extent of Seventy Five Dollars ($75.00); also bruises, starving and weakening of other horses and mares in said car to the extent of Three Hundred Dollars, ($300.00) making a total loss, injury and damage to the petitioners of One Thousand and Twelve
52 Dollars ($1012.00) caused by the negligence of the said Company, its agents and employees in carrying said car of horses.

10th.

On May 11th, 1907, petitioners sued out an attachment against said Company, which attachment was made returnable to the June Term, 1907, of the City Court of Cordele, and which attachment was, by H. F. Musselwhite, Deputy Sheriff of said County levied upon one box car # 12098 as the property of said Company.

11th.

On the — day of May, 1907, the said Company gave a replevy bond or a bond to release the attachment for said car so levied upon, with B. S. Dunlap, of said County, as surety thereon and on the filing of such bond the attachment became dissolved.

12th.

Petitioners file this their declaration against the defendant in said attachment and pray that they have judgment for the full amount of their claim against said Company, and that the judgment for same be entered against the defendant Company as principal and the said B. S. Dunlap the surety on said replevy bond for the damages proven.

Petitioners will ever pray, etc.

HILL & ROYAL,
Petitioner's Attorneys.

53 GEORGIA, *Crisp County:*

Due and legal service of the notice of filing above and foregoing declaration in attachment is hereby acknowledged. This July 26th, 1907.

———,
Atty's for Defendant.

In City Court of Cordele, June Term, 1907.

PLESS & SLADE
vs.
C., N. O. & T. P. Ry. Co.

Now comes the Cincinnati, New Orleans & Texas Pacific Railway Company, corporation named as defendant in the above stated case, and demurs to the declaration filed by plaintiffs on their attachment issued therein and for cause of demurrer say:

1st.

Because it is admitted in the first paragraph of plaintiffs' declaration, that this defendant is a non-resident railroad corporation; and plaintiff- do not, and fail to allege in their said declaration, that this defendant was transacting business, or had, an office, agent or place of business in the County of Crisp or the State of Georgia, thereby showing no jurisdiction of defendant or its property, in the City Court of Cordele.

2nd.

53½ Because the acts of negligence alleged (if any) were committed without the limits of the County of Crisp and State of Georgia; plaintiffs do not fail to allege, that such acts of negligence as alleged, were committed by the agents and employees of this defendant, within the limits of the County of Crisp or the

State of Georgia, thereby failing to show or to place any jurisdiction of said case in the City Court of Cordele.

3rd.

Because it is alleged that a contract of carriage was entered into between plaintiffs and this defendant and that same was a conditional contract in writing, and that it was made, entered into and executed and delivered in the State of Kentucky, and without the limits of the County of Crisp and the State of Georgia; Therefore the City Court of Cordele, Crisp County, Georgia, is without jurisdiction and acquires no jurisdiction to enforce or entertain any action thereon, without first having service of legal process, whereby the City Court of Cordele acquires jurisdiction of the defendant party or parties or defendant's property.

Wherefore, this defendant prays judgment hereon and that said cause be dismissed.

CRUM & JONES,
Attorneys for C., N. & T. P. Ry. Co.

54 In the City Court of Cordele, June Term, 1907.

PLESS & SLADE
vs.
C., N. O. & T. P. RY. CO.

And now comes the Cincinnati, New Orleans & Texas Pacific Railway Company, corporation named as defendant in the above stated case, without waiving its demurrer filed herein, but insisting thereon and by its attorneys, Crum & Jones, files this its answer to the petition and declaration of plaintiff's files in said case, and for answer says:

1st.

Defendant admits paragraph one of plaintiff's petition.

2nd.

Defendant denies paragraph two of plaintiff's petition.

3rd.

Defendant admits paragraph three of plaintiff's petition, but sets forth that the contract for transportation of the car of horses from Wilmore, Kentucky, to Cordele, Georgia, was a written contract containing conditions and defendant demands strict proof of same.

4th.

Defendant denies paragraphs 4, 5, 6, 7, 8, & 9 of plaintiff's petition and demands strict proof of the same.

5th.

Defendant admits paragraphs 10 & 11 of plaintiff's petition.

55 Wherefore defendant having answered each paragraph of plaintiff's petition and declaration, begs leave to answer further and for further answer says.

(A.)

Defendant admits having received on its line of road at Wilmore in the State of Kentucky, a car load of live stock for shipment to the City of Cordele, Georgia, and says that it issued to plaintiffs the usual live stock bill of lading constituting the contract of affreightment for the transportation of live stock by steam railroad and that plaintiffs accepted of signed and bound themselves to the terms, conditions and agreement set forth in said contract of affreightment and that they are bound thereby.

(B.)

Defendant shows that it has no line of railroad within the State of Georgia; has no agent, office or place of business nor does it transact and carry on in any manner, business in the County of Crisp or the State of Georgia. That it is a non-resident railroad corporation with its place of residen/ in the City of Cincinnati, in the State of Ohio, and that it is chartered and operated under and by virtue of the constitution and laws of the State of Ohio.

(C.)

Defendant shows that an agreement existing between itself and the intermediate common carriers, whereby this defendant, instead of unloading and transferring freight at the points of connection
56 or on State line, receives cars loaded to be hauled to the place of destination without breaking bulk and discharging its contents under an implied agreement to return its cars as soon as practical, reloading to some point on or near its line in the States of Ohio, Kentucky, and Tennessee, and therefore the car attached in this case was likewise handled under such existing agreements and therefore is not subject to attachment, neither has the City Court of Cordele jurisdiction of this defendant, person or property.

Wherefore, defendant prays that it be hence discharged with its reasonable cost, etc.

CRUM & JONES,
Attorneys for C., N. O. & T. P. Ry. Co.

Attachment, etc., City Court of Cordele, June Term, 1907.

PLESS & SLADE
vs.
C., N. O. & T. P. RAILWAY CO.

After argument, the within demurrer is hereby overruled. This 7th day of August, 1907.

E. F. STROZIER,
J. C. C. C. C.

HILL & ROYAL,
Plaintiff's Attorneys.

57 City Court of Cordele, June Term, 1907.

PLESS & SLADE
vs.
C., N. O. & T. P. RAILWAY COMPANY.

And now come the plaintiffs in the above stated cause and demur to defendants answer, and for cause of demurrer says:

1st.

They demur specially to paragraphs B. & C. of said answer and say that same should be stricken for the reason that they do not set up any defense to plaintiffs' suit nor do they set out such facts as would constitute a good reason why the Court has not jurisdiction of said cause;

Wherefore plaintiffs pray that said two paragraphs be stricken from said answer.

They will ever pray, etc.

HILL & ROYAL,
Plaintiffs' Attorneys.

After argument it is ordered, considered and adjudged that the above and foregoing demurrer be sustained, and paragraphs B. & C. of defendant's answer be and they are hereby stricken.

This 7th day of August, 1907.

E. F. STROZIER,
J. C. C. C.

Attachment in City Court of Cordele, June Term, 1907.

PLESS & SLADE
vs.
C., N. O. & T. P. RAILWAY CO.

58 A demurrer to the original motion to quash the writ of attachment in the above stated cause coming on to be heard, this the 7th day of August, 1907, during the June Term, 1907, the Court sustaining the demurrer; to which ruling defendant hereby excepts and assigns the same an error, and prays that these exceptions be certified by the Court and entered on the minutes.

This the 7th day of August, 1907.

CRUM & JONES,
Defendant's Attorneys.

I hereby certify, that the foregoing bill of exceptions is true, let the same together with this certificate be entered on the minutes, this the 7th day of August, 1907.

E. F. STROZIER,
J. C. C. C.

Attachment in City Court of Cordele, June Term, 1907.

PLESS & SLADE
vs.
C., N. O. & T. P. RAILWAY CO.

A demurrer to the original plea to the jurisdiction of the City Court of Cordele, in the above stated cause, coming on to be heard this August 7th, 1907, during the June Term, 1907, the Court sustaining the demurrer; to which ruling hereby excepts, assigns the same as error, and prays that these exceptions be certified by the Court and entered on the minutes this the 7th day of August, 1907.

CRUM & JONES,
Defendant's Attorneys.

59 I hereby certify, that the foregoing bill of exceptions is true; let the same together with this certificate, be entered on the minutes this the 7th day of August, 1907.

E. F. STROZIER,
J. C. C. C.

Attachment in City Court of Cordele, June Term, 1907.

PLESS & SLADE
vs.
C., N. O. & T. P. RAILWAY CO.

A demurrer to the original answer to the declaration in the above stated cause, coming on to be heard August 7th, 1907, during the June Term, 1907, the Court sustaining the demurrer, as to paragraphs "B" & "C" of defendant's answer; to which ruling defendant hereby excepts and assigns the same as error, and prays that these his exceptions be certified by the Court, and entered on the minutes.

This the 7th day of August, 1907.

CRUM & JONES,
Defendant's Attorneys.

I hereby certify that the foregoing bill of exceptions is true; let the same together with this certificate be entered on the minutes, this the 7th day of August, 1907.

E. F. STROZIER,
J. C. C. of C.

60 Attachment in City Court of Cordele, June Term, 1907.

PLESS & SLADE
vs.
C., N. O. & T. P. RAILWAY CO.

A demurrer to the original declaration, filed by defendants on the attachment, in the above stated cause, coming on to be heard this the 7th day of August, 1907, during the June term 1907, the Court, overruling the demurrer, to which ruling, the defendant, hereby excepts and assigns the same as error, and prays that these exceptions be certified by the Court, and entered on the minutes, this the 7th day of August, 1907.

CRUM & JONES,
Defendant- Attorneys.

I hereby certify, that the foregoing bill of exceptions is true, let the same together with this certificate be entered on the minutes, this the 7th day of August, 1907.

E F. STROZIER, *J. C. C. C.*

61 In the City Court of Cordele, August Term, 1907.

PLESS & SLADE
vs.
CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY.

Complaint for Damages.

Before his Honor E. F. Strozier, and a Jury at Cordele, Georgia, August 15th, 1907.

Appearances.

For the plaintiff: Hill & Royal.
For the defendant: Crum & Jones.

Brief of Evidence.

E. M. PLESS, one of the plaintiff firm, sworn in behalf of plaintiff testified:

I am a member of the firm of Pless & Slade, a firm engaged in the stock business. On March 1st, 1906 I shipped a carload of stock from Wilmore, Kentucky, loaded them between three and four o'clock in the morning, and delivered them to the Southern Railroad, I suppose, they call it the Southern there, the Queen & Crescent. I don't know exactly what railroad company I contracted with, I don't remember. Refreshing my memory from the paper presented, it was the Cincinnati, New Orleans & Texas Pacific Rail-

road Company. They were to deliver the stock to Cordele,
62 and I was to pay them as their charges for so doing a hundred and twenty nine dollars——

Mr. Jones asks to be allowed to ascertain if this testimony is not all in writing, and if so the writing is the highest and best evidence.

The Court rules that Mr. Hill has the right to examine his witness, that Mr. Jones can bring that out afterwards, if he desires.

WITNESS: They were to transport this carload of stock from Wilmore, Kentucky to Cordele. This charge of one hundred and twenty nine dollars was all the charges they made, and it was to be paid here, upon the arrival of the stock. It was paid here, to Mr. Stanfield, the agent of the Georgia Southern road. We were required to pay other charges, a feed bill, and two dollars charged for unloading. Under ordinary circumstances, according to the schedules of the railroads, it would only take about three days to transport this stock from Wilmore, Kentucky to Cordele. During that time they should be fed and watered one time, in Atlanta. They have three bills charged for feeding this lot of stock, and we were required to pay these extra charges to the agent here. The papers presented are the receipts of Mr. Stanfield for the feed bills and other charges, dated 3/8/06, one for freight charges a hundred and twenty nine dollars, one for unloading and reloading two dollars, another for feeding twenty five horses and mules, ten dollars, and another
63 for feeding eight mules and seventeen horses ten dollars.

Every one of those horses were in good condition when delivered to the railroad company at Wilmore. When they arrived at Cordele they were in very bad condition. Refreshing my memory from the petition presented: There was one gray horse of the value of three hundred dollars that died; he was worn out, and gave out and fell down as soon as we got him to the stable we gave him the very best attention we possibly could. Of course he was bruised more or less, but I couldn't see any bruises on him sufficient to cause his death, it must have been from internal injuries, or something of that sort. There was a dark bay mare that seemed to be mashed in her hips, she couldn't put one foot to the ground at all, and she lived a few days and died. We valued her at a hundred and seventy five dollars; she would have brought more money on the market here. Then there was a bay horse about five years old, a mighty nice horse that seemed to be mashed, and injured internally some way or another that we thought would die before any of the others, but he finally recovered to a great extent and we kept him some three or four months and sold him for fifty dollars less than we paid for him at Wilmore Kentucky. There was a great deal of expense attached to keeping him on account of his injuries, for medicines and medical attention: Fifty dollars loss is what we scheduled him at.

There was a black horse about five years old with both hind
64 hocks injured was in a serious condition, and we considered him injured fifty dollars. And then we had a young trotting mare that we paid three hundred and fifty dollars for in Wilmore, and she was badly injured in three legs. We doctored her some two or three months, I suppose, before we could use her any at all, and we

estimated the damage to her at one hundred dollars, which, I think, was mighty reasonable. I believe that covers those losses, except that three hundred dollars. Explaining that three hundred dollar charge: We made this petition while the stock was in a serious condition, and we were very busy, and it didn't look like we could tell hardly what the damage was, and we just mentioned the three hundred dollar damage to balance off all we didn't specify as damage to each horse, but there was one sorrel horse seriously injured in both hind legs, and Mr. Webb taken this one and treated him, and he said he thought the damage on him would be reasonable anywhere from fifty to seventy five dollars; I would have thought it was seventy five dollars. Then we had a gray horse mule badly cut across the rump and hind hocks, and fifty dollars would have been a light estimate of his damage. We also had an extra nice mule worth about two hundred and fifty dollars that died; and then we had a five year old bay horse that was injured in one hind leg that left a hard knot there, and what we call a curb. That is a permanent injury, in other words it stays there without very fine treatment. That is a horse that I sold a time or two and he never
65 gave satisfaction and I had to take him back. I consider that horse damaged at least seventy five dollars. There were other damages, but that is more than enough to cover our claim. We didn't make a claim sufficiently large to cover the damages because this stuff turned out so much worse than we expected at the time we filed the claim.

Cross-examined, Mr. Pless testified:

Mr. Hill objects to proof of where the line of the C., N. O. & T. P. Railway runs to from Wilmore Kentucky, as immaterial and irrelevant.

Objection overruled.

WITNESS: I don't know where this road runs from Wilmore don't know whether the C., N. O. T. P. Railroad extends in this direction out of the State of Kentucky. The damage I have estimated and shown to the jury occurred somewhere between here and Wilmore Kentucky; I couldn't tell you on what line of the road it occurred. I wasn't with them. That is my signature to the contract presented. I signed that "Pless & Slade." I don't know that I knew the contents of that contract when I signed it, but I suppose them to be all about alike and when I have been signing them for twenty years, have to sign one to get the stock off. The statement on the back of it, "This contract signed before stock loaded, only one issued for this shipment" I suppose was on there when I signed it. I don't remember; you see the night man had to get off and we loaded these
66 stock between three and four o'clock in the morning. I couldn't say on what line of road my stock was injured, couldn't say whether this road, the Cincinnati, New Orleans & Texas Pacific injured them, nor that any act of theirs delayed them; I wasn't with them and couldn't tell you.

J. SLADE, one of the plaintiff firm, sworn in behalf of plaintiff, testified:

I am a member of the firm of Pless & Slade, a firm engaged in the stock business. I recall a carload of stock shipped from Wilmore Kentucky to Cordele consigned to our firm about March 1st, 1906. I can't say for sure what day it arrived here whether the 6th or the 7th, but it was one or the other of those days. It seems to me like it arrived here on a special train, but I am not sure, it was either that or the shoo-fly on the Georgia Southern, about seven o'clock, I think, it arrived. They were in transit six or seven days. The carload of stock was in bad condition when they arrived here, damaged and bruised up and in bad shape. I can refresh my memory from the paper presented and detail the condition of some of them and some I can not—I can remember some without this. There was a gray horse we took off the car that wasn't hardly able to stand up and get to the barn and he died in a few days after we took him off the car; and there was a black mule practically in the same fix, seemed to be mashed some way internally, and she died; and then there was a sorrel horse that was injured in both hind
67 legs and I think maybe one front leg; and *then* was a bay horse injured in both hind legs and seemed to be hurt internally some way or another. I can't call over all of them. At that time I examined the stock and made an estimate as to the amount of the damage to them. I think the amount was about a thousand dollars, I am not sure. I had other stock men to examine them; Mr. Webb another stock dealer here I think was one, and it seems like Rabe Harris saw them, and I am satisfied Mr. Fullington did. The amount we ask for won't cover our losses; we couldn't tell at the time we made the estimate, and the damage was more than we figured on.

Cross-examined, Mr. Slade testified:

I do not know on what line of road the damage to our stock occurred.

G. W. FULLINGTON, sworn in behalf of plaintiffs, testified:

I live in Dooly County. Am engaged in farming and dealing in live stock; have been in the live stock business I suppose, twenty years; I mean by that the business of buying and selling horses and mules, and I also work them on my farm. I remember seeing a carload of stock consigned to Pless & Slade about the 6th of March 1906. I don't know their condition at the time they arrived here, I wasn't here. I suppose it was two or three days, probably four days after they arrived that I saw them. I did not at that time,
68 make an examination of them with view to estimating the damage done to the car of stock. The damage to them was pretty considerable; some of the horses, it seemed to me, was damaged at least fifty per cent., possibly more than that, and some of them it looked like was almost worthless. I remember one, a gray horse, and one bay horse that were in bad condition, and they looked to be very nice horses. I don't know what was the cost of the horses except what they told me.

J. R. MATHIS, sworn in behalf of the plaintiff, testified:

I remember examining a carload of stock consigned to Pless & Slade about March 1st 1906. I recall the affidavit presented to me, and remember most of it because I helped to treat the stock. At that time I was running a stable here. I examined the horses, helped them to sit up with them and treat them, and was there when they were unloaded and helped unload them. I thought their condition was the worst I had ever seen. Some of them died; I hauled off two of them. I think one of them, the gray horse, was the best horse he had. I think it was a bay mare in the place of a horse that died. That horse would have sold for close to two hundred dollars, might have been a little less. I think the gray would have sold for three hundred and fifty. There were so many of them that I can't
69 remember them all I remember a black horse that was injured very badly in the hind legs and had a skinned place up on his head. I remember a bay mare that was injured in three legs; I should consider that she was injured at least to the extent of one hundred dollars, because there was a knot on her that never did get off. He kept her seven or eight months, and it was two months before she was able to work any. I recall a sorrel saddle horse in that car. He was injured so that he could hardly put one foot to the ground for a good long time. I assisted in treating them, staid up there several nights looking after that horse. To the best of my belief that horse was damaged something like seventy five dollars. I can't remember all those facts just like it was yesterday. I don't remember a bay horse that staid in the first stall as you go in the stable. I did not make an estimate of the damage to the car of stock at that time. I signed the affidavit presented, but as I said, I can't remember everything about it.

Mr. Jones objects to question: "When you signed that affidavit what did you base it on?"

Objection overruled.

WITNESS: I don't remember just what it was, but I signed that. I saw those horses after that for some time. The damage to the horses developed to be worse than we estimated it.

Cross-examined, Mr. Mathis testified:

I don't know a thing in the world about what line of road this car of stock was injured on. I know they came from the
70 Georgia Southern; I helped to unload them and put them in their stable, and they were unloaded from the Georgia Southern tracks. I don't know a thing in the world about whether the Cincinnati, New Orleans and Texas Pacific people caused any damage or delay to this stock.

Mr. Hill offers in evidence letter from the Superintendent of the C., N. O. & T. P. Railway Company to Mr. H. F. Molloy Auditor of the same Company, dated May 7th 1906, as follows:

"Your letter of May 2, file K-8946 relative to the handling of stock in CNO 9233. This car arrived at Somerset, 10:05 A M and departed 10:25 A M March 2d. The car passed Oakdale in #31 without delay, and arrived Chattanooga same afternoon. I quote the following statement from conductor Thomas who handled the

stock "CNO&TP 9233-26 horses My record shows stock loaded at 3 AM Mar. 2d, no one in charge of stock. Handled with the best of care. My record shows one gray horse sick all day coughing. Stock was looked at at all stops. This gray horse got down after leaving Dayton. I never stopped any more until I got to Citico. He was down then. Horse was sick all day, shaking like he was cold. There was no damage done to the stock while in my charge. I watched them very close all day on account of this horse being sick. Was the 5th car from caboose leaving Somerset at 10:30 AM. Mar. 2d, arriving at Chatta. 2:30 AM. Mar. 3d. No rough handling."

71 Delivery was made to the Southern Railway as soon as they would accept the car."

Mr. Hill also offers in evidence letter from M. F. Molloy, Auditor, to J. A. Graig, F. C. A., Georgia Southern & Florida Railway Company, dated May 25th 1906, as follows:

Your base A 5314 This shipment was loaded at Wilmore, Ky. 7:30 P.M. March 1st in good condition; left Wilmore 4:48 A. M. March 2nd, train # 31, and arrived at Somerset same train 10:05 A. M. There was no rough handling on our Cincinnati Division and stock was in good condition on arrival at Somerset. There was no man in charge of stock, but it was handled with the best of care.

It was noted that one gray horse was sick on our Chattanooga Division, and this animal was examined at all stops. This gray horse is reported as having been sick all day, coughing, and shaking as if he was chilled.

Car arrived at Chattanooga 2:30 A M. March 3rd and was delivered to Southern Railway 3:20 A M same date.

Stock was delivered to Yarnell's stock yards by Southern Railway at Chattanooga 6 A M March 3rd, unloaded, fed, and reloaded 8 P. M. same date. We are advised by the stock yard people that one bay horse had both hocks bruised and swollen, and one black mare was stiff in limbs, which were bruised and swollen. You will observe from this record of the stock yards that no exception

72 was taken to the gray horse which was reported sick on our Chattanooga Division. The distance between Wilmore and Chattanooga is 239 miles. Time in our possession was 31 hours."

Plaintiffs rest.

Mr. Jones tenders in evidence contract dated Wilmore, Kentucky, March 1st, 1906, issued by J. P. Holtzclaw, Agt. C. N. O. & T. P. Ry. Co., and signed by Pless & Slade. Admitted without objection, as follows:

"*Cincinnati, New Orleans & Texas Pacific Railway Company Contract for Limited Liability in the Transportation of Live Stock at Reduced Rates.*

WILMORE, KY., STATION, *Mar* 1, 1906.

1. Consignments.—This contract made and entered into on the above date by and between the Cincinnati, New Orleans & Texas Pacific Railway Company, (hereinafter called the carrier) and Pless and Slade (hereinafter called the shipper). Witnesseth: that the

said shipper has delivered to the said carrier live stock of the kind, description and number indicated below, to be carried by said carrier to —— a point on his line and thence as agent of the shipper to be forwarded by connecting carrier to the following consignee and destination via the route indicated:

73 Numbers and initials of cars.	Consignee, destination, and route.
C. N. O. 9233.	Pless & Slade, Cordele, Ga. Sou. to Chatta. " " Atlanta. C. of Ga. Macon car G. S. & F.
Number, kind, and description of live stock (shipper's load and count).	Weight, subject to correction (stamped here).
26 horses and mules Stoc.	G. S. & F. Ry. Co. A 5314 Claim Department. 20000

Charges advanced and which shipper agrees to pay at destination.
—— ——.

2. Carrier's liability on his own line only.—It is understood and agreed by said shipper that said carrier's liability extends to the destination of said stock only when said destination is on the line of the C. N. O. & T. P. R'y; otherwise such liability extends only to the station where said live stock is to be received by connecting carrier for transportation to or toward destination, and said carrier's liability shall cease when said live stock is ready to be delivered to owner or consignee, or to connecting carrier whose line may constitute a part of the route to destination.

3. Limit of value.—That this agreement is subject to the following terms and conditions, which the said shipper accepts as just and reasonable, and which he admits having read and having had explained to him by the agents of the said carrier, viz:

That the published freight rates on live stock of said car-
74 rier are, in all cases, based on the following maximum valuations, which are as high as the profit in the freight rates will admit of the carrier assuming responsibility for:

Stallions or Jacks, not exceeding	$150.00	each.
Horses and Mules, not exceeding	75.00	"
Mare and colt together, not exceeding	100.00	"
Ponies, not exceeding	40.00	"
Cattle, except yearlings, not exceeding	30.00	"
Cow and Calf, together, not exceeding	35.00	"
Yearling cattle, not exceeding	20.00	each.
Hogs, pigs, calves, sheep or lambs, not exceeding	5.00	"
Turkeys, not exceeding	1.50	doz.
Geese, not exceeding	1.00	"
Chickens, Ducks, or Guinea Fowls, not exceeding	75	"

That the tariff regulation of said carrier provide that for every increase of one hundred per cent., or fraction thereof, in the above valuations there shall be an increase of fifty per cent. in the freight rate; and

That the said shipper, in order to avail himself of said published freight rates, agrees that said carrier shall not, in any case of loss or damage to said live stock, be liable for any sum in excess of the actual value of said stock at the place and date of shipment nor for any amount in excess of the values stated above, which are hereby agreed to be not less than the just and true values of the animals, unless an additional amount is herein stated and paid for.

75 4. Guaranteed freight rate.—That the rate of freight guaranteed by said carrier in view of the above stipulated valuations is $129.00 per stand. car from Wilmore, Ky. to Cordele Ga., and that said shipper accepts this rate of freight, and agrees to pay same at destination in connection with the charges advanced by said carrier, as indicated above, and any other legitimate charges which said carrier may advance for account of said shipper between point of shipment and destination for feed, water, etc.

6. Inspection of cars.—That said shipper shall inspect the car or cars provided by said carrier for the transportation of said live stock, and shall before shipment, satisfy himself that said car or cars are in good order and suitable and sufficient for said transportation and that said carrier shall not be liable on account of loss or injury to said live stock happening by reason of alleged insufficiency in or defective condition of the body of said car or cars.

7. Shipper to keep openings closed.—That said shipper shall see that all doors and openings in said car or cars are at all times so closed and fastened as to prevent the escape therefrom of any of said stock, and said carrier shall not under any circumstances, be liable on account of the escape of any of said stock through said openings.

7. Double decks and partitions.—That in case said carrier permits shipment of live stock in double deck cars, or in cars subdivided by partition to separate different kinds of stock, said shipper

76 agrees to provide said decks or partitions, at his own expense, and to assume all liability for loss or damage caused by the use of said decks or partitions, whether on account of their improper or insufficient construction, or otherwise.

9. Bedding, loss from improper loading, etc.—That said shipper agrees to provide at his own expense such bedding or other suitable appliances in said cars or car as will enable said stock to stand securely on its feet, and said shipper hereby releases said carrier from all liability for or on account of any injury or injuries which said stock, or any one of them, may receive in consequence of any animal, or animals composing said stock failing to keep their feet; or in consequence of any of them being wild, vicious, unruly, or weak; or in consequence of heat, suffocation, or other ill effects of being crowded in said cars, or, in consequence of being injured by burning hay, straw or other material used by said shipper or his

agents for feeding or bedding said stock; or in consequence of being injured by heat, cold, or any change in weather.

10. Loss from delays.—That said shipper releases said carriers from all damage, injury or loss which may be sustained by reason of any delay or detention in transportation not resulting from negligence of said carrier or his agents, whether the result from any mob, strike or threatened violence to person or property from any source, or from stress of weather, or from any cause whatsoever be-
77 yond said carrier's control; and it is agreed that in case of delay as above described, not the result of negligence on the part of said carrier, that the said shipper shall feed, water and take other proper care of said stock at his own expense; and

That said carrier while using all reasonable effort for the prompt transportation of said stock does not guarantee to place it in any market at any specified time.

11. Stops for feed and water.—That while said carrier agrees to stop his trains at such points as will enable said shipper to comply with the law by feeding and resting said stock at proper intervals, said carrier shall not delay his train longer than necessary to leave said stock at such proper stations, and the time elapsing until the next available train of said carrier shall not be deemed a delay; and if said shipper, or his agent or his agents, shall fail and refuse to reload said stock within a reasonable time for so doing after cars have been placed ready to receive the same, then said carrier may in his option consider this contract as abandoned by said shipper, and said carrier may collect the local rate for the transportation already furnished.

13. Claims for damages.—That the presentation of this contract shall be sufficient evidence of ownership to release said carrier from all liability on account of wrong delivery, but shall not prevent said carrier from demanding (if he so elect) the identification of the party presenting the contract before making delivery of said stock.

78 That no claims for damages which may accrue to the shipper under this contract shall be allowed or paid by said carrier, or claimed, or sued for in any court by said shipper, unless said shipper gives prompt notice of said damages to the nearest agent of said carrier thereby enabling said carrier to make an inspection of the stock alleged to be damaged; and, unless claim for such damage or loss shall be made in writing and verified by an affidavit of said shipper, or his agent, and filed with the Freight Claim Department of said carrier in the City of Cincinnati within five days from the time said stock is removed from said car or cars.

14. Contract with connecting carrier.—That if the destination of said stock is beyond the line of said carrier, and in order to reach said destination said stock must be transported over the lines of any other carrier or carriers, delivery of said stock must be made to said connecting carrier or carriers upon such terms and conditions, not effecting the rate of freight hereinbefore expressed, as said connecting carrier or carriers may be willing to accept, provided that the

terms and conditions of this contract shall inure to such connecting carrier or carriers, unless they shall otherwise stipulate.

In witness whereof, the Agent of the Cincinnati, New Orleans & Texas Pacific Railway Company, and the owner of the stock or his authorized agent, have set their hands to this agreement and to a duplicate thereof.

PLESS & SLADE (*Owner*).
J. P. HOLTZCLAW,
(*Agent of C., N. O. & T. P. Ry. Co.*)

79 (Stamped on face:)

It is expressly agreed by the shipper that this contract in so far as it extends to and binds any connecting carrier, shall be considered as having been entered into between the shipper and such connecting carrier at the time and place that the shipment is delivered to such connecting carrier.

(Written across the back:)

This contract signed before stock loaded. Only one issued for this shipment.

Defendant announces closed.

Mr. Hill offers in evidence for plaintiff section 196 of the Constitution of the State of Kentucky, as follows:

"Transportation of freight and passengers by railroad, steamboat, or other carrier, shall be so regulated, by general law, as to prevent unjust discrimination. No common carrier shall be permitted to contract for relief from its common law liability."

Mr. Jones objects, that the regulation as provided for in this section should accompany it, and unless it does it is irrelevant and inadmissable; that it is merely a paragraph of the Constitution of the State giving the Legislature and laws. He further objects to it on the ground that this suit is brought under the Georgia laws, and is not a suit on a Kentucky contract.

Objection overruled.

80 Plaintiff announces closed.

Mr. Hill moves the court to direct a verdict for plaintiff for the amount sued for.

Mr. Jones insists that the contract offered is a legal contract, and forms an issue for the jury to pass upon.

After argument the court directs a verdict for plaintiff.

The foregoing brief of evidence approved and ordered filed. This September 9th, 1907.

E. F. STROZIER,
J. C. C. C.

81 Attachment, etc., City Court of Cordele, August Term, 1907.

PLESS & SLADE
vs.
CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY CO.

We the jury find for the plaintiff One Thousand and Twelve ($1012.00) Dollars. This August 15th 1907.

R. L. WILSON, *Foreman.*

Wherefore it is ordered considered and adjudged by the Court that the Plaintiff, Pless & Slade, have and recover of the defendants the Cincinnati, New Orleans & Texas Pacific Railway Co. and the surety on the replevy bond B. S. Dunlap, the sum of One Thousand and twelve and 00/100 Dollars ($1012.00) and all costs accumulated to be taxed by the Clerk of the Court. In open Court this August 15, 1907.

E. F. STROZIER,
J. C. C. C.

HILL & ROYAL,
Pl'ff's Att'ys.

82 Clerk's Office, City Court of Cordele.

CORDELE, GA., *Sept. 12th*, 1907.

I Hereby Certify, That the foregoing pages, hereto attached, contain a true transcript of such parts of the record as are specified in the bill of exceptions and required by the order of the Presiding Judge, to be sent to the Court of Appeals in the case of Cincinnati, New Orleans & Texas Pacific Ry. Co., Plaintiff in error, *vs.* Pless & Slade, Defendant in error.

I Further Certify, that the August Term of said Court, at which said case was tried, adjourned Still in Session 190–.

All of which appears from the Records and Minutes of said Court.

Witness my signature and the seal of said Court, affixed the day and year first above written.

[SEAL.]

J. A. LITTLEJOHN,
Clerk City Court of Cordele.

(Endorsed:) No. 758. Court of Appeals of Georgia. October Term, 1907. Cincinnati, New Orleans & Texas Pacific Ry. Co., Plaintiff in Error, *vs.* Pless & Slade, Defendant in Error. Transcript of Record. Filed in office, this 14 day of Sept., 1907. Logan Bleckley, Clerk Court of Appeals. Crum & Jones, Cordele, Ga., Attorney's Plaintiff in Error.

83 204.

Case No. 758.

Court of Appeals of Georgia.

CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY
v.
PLESS & SLADE.

By the COURT:

1. In cases of attachment, the giving of a replevy bond, the filing of a general demurrer, and an answer, without protestation, each operates to convert the action from a suit *in rem* into an action *in personam:* and the case, so far as obtaining a common-law judgment against the defendant in attachment is concerned, is in the same condition as if there had been an action begun in the usual form followed by personal service.

(*a*) Where the defendant in attachment has, by any of the methods mentioned above, effected a general appearance in the suit, the dismissal of the attachment does not operate to dismiss the suit.

(*b*) Where the defendant in attachment enters a special appearance and calls in question the validity of the attachment and of the levy thereon, but also gives a replevy bond and enters a general appearance (his surety not complaining), a consideration of the grounds of the special appearance is immaterial.

2. A defendant in attachment who has made a general appearance in any of the methods stated in the preceding head note may,
84 by timely pleadings, nevertheless question the venue of the action or the court's jurisdiction of the subject-matter. He may make any defense he could have made if he had been personally served with process.

(*a*) A non-resident corporation is, except in certain cases where by statute the contrary is prescribed, subject to suit in any county in this State where it can be served or where it submits itself to the jurisdiction of the court by a general appearance.

(*b*) The statutory rule confining suits against railway companies for torts to the county where the cause of action arose does not apply to torts committed beyond the limits of the State by non-resident railway companies.

(*c*) Foreign corporations are subject to attachment in this State, whether they do business herein or not.

3. Where a shipment of goods is delivered in good order to a common carrier, under a contract that it shall transport them to its terminus and deliver them to a connecting carrier, and the shipment arrives at destination in a damaged condition, and the proof shows that at least a portion of the damage was done by the initial carrier, it will be presumed to have caused the whole damage, until it submits proof to the contrary.

On May 11, 1907, Pless & Slade sued out, before the city court of

Cordele, an attachment against the Cincinnati, New Orleans &
Texas Pacific Railway Company on the ground of non-resi-
85 dence, and caused it to be levied on a box-car of that com-
pany, found in the yards of the Atlanta, Birmingham & At-
lantic Railway Company, at Cordele. During the same month the defendant executed a statutory replevy bond. Subsequently the defendant entered a special appearance, and made a motion to quash the attachment, upon many grounds, presenting a number of nice propositions of law; but as it is decided that they are not properly before the court for decision, it is unnecessary to set them out. The defendant also filed a plea to the jurisdiction, which it protested was likewise filed as a special appearance; and in this plea substantially the same questions were raised. The special appearance, motion to quash and plea to the jurisdiction were stricken by the court on demurrer. At the first term, the plaintiffs filed their declaration in attachment, showing that their suit against the defendant company was on account of damages to a shipment of live stock entrusted to it in the capacity of common carrier. To this declaration the defendant filed a demurrer, without protestation and without in any wise declaring it to be filed subject to the special appearances; the grounds being (1) that the defendant is shown to be a non-resident corporation and is not alleged to be transacting business, or to have an office or agent in this State; (2) that it does not appear that the acts of negligence were committed in Crisp county within the jurisdiction of the city
court of Cordele, but it appears that they were committed be-
86 yond the limits of the State; (3) that the contract of carriage
was made beyond the limits of the State, and the court was therefore without jurisdiction. The court overruled the demurrer. The defendant also filed an answer. Upon its face it was declared to be subject to the demurrer just filed, but was not otherwise limited in its effect as a general appearance. On demurrer the court struck a portion of this answer, which pleaded that the court was without jurisdiction because the defendant was a non-resident corporation not doing business in the State, and because the car levied upon was an instrumentality of interstate commerce. To all of these rulings exceptions were duly preserved. The case proceeded to trial. The plaintiffs proved that they delivered the shipment of live stock to the defendant at Wilmore, Kentucky, to be transported to Cordele, Georgia, and that after an unreasonable delay the shipment arrived in Cordele damaged in certain enumerated particulars. The shipment was made over connecting lines and the delivery was made by the Georgia Southern & Florida Railway Company. It was also shown that some of the damage occurred before the shipment left the custody of the defendant. The defendant introduced in evidence a duly signed live stock contract in usual form, executed at Wilmore, Kentucky, but offered no further proof as to how the loss occurred. The plaintiff then introduced that portion of the constitution of the State of Kentucky which provides, "No common
carrier shall be permitted to contract for relief from its com-
87 mon liability." Upon the conclusion of the evidence, counsel
for both parties agreeing that there was no dispute as to the

amount of recovery, if any at all was authorized, the court directed a verdict for the plaintiff, and exception to this is taken.

POWELL, *J.* (after stating the facts as above):

The giving of the replevy bond was a general appearance by the defendant, dissolving the attachment and converting it from action *in rem* into an action *in personam*. Thompson *v.* Wright 22 Ga. 607; Walter *v.* Kierstead, 74 Ga. 19; King *v.* Randall, 95 Ga. 449; Woodbridge *v.* Drought, 118 Ga. 671. "When the defendant has given bond and security, as provided in this code, or when he has appeared and made defense by himself or attorney at law, or when he has been cited to appear, as provided in this code, the judgment rendered against him in such case shall bind all his property, and shall have the same force and effect as when there has been personal service, and execution shall issue accordingly." Civil Code, § 4575. Originally, at common law, all suits were begun by seizure of the defendant's person or property and the defendant appeared by giving bail. Now suits are for the most part begun by service of process; but in certain cases where it is inconvenient or impossible to serve common process, the law still recognizes the right to seize the property of the defendant for the purpose of
88 compelling an appearance. The attachment is in such cases the process, and whenever the defendant obtains that for which process is designed, namely, notice of the pendency of the action, and, being so notified, appears in any manner which lawfully discloses to the court that he has the notice, the process is *functus officii*, its regularity and efficiency are no longer in question, and the court, having the person of the defendant before it, proceeds to trial and to judgment as in actions begun in the ordinary form. The dismissal of the attachment does not operate to dismiss the suit, but the plaintiff may proceed upon his declaration for a common-law judgment. Civil Code, § 4557; King *v.* Randall, *supra*. The giving of a replevy bond is a judicial admission of notice, equivalent in effect to acknowledgment or waiver of personal service. Camp *v.* Cahn, 53 Ga. 558; DeLeon *v.* Heller, 77 Ga. 742. If the attachment is for any reason subject to dismissal, the lien acquired by the levy falls and the surety on the replevy bond is discharged; but "the attachment, whether good or bad, brings the defendant into court, if he is served with notice, or if he appears and defends, or if he replevies the property, and he remains in court, though the attachment be dismissed." Bruce *v.* Convers, 54 Ga. 678, 680. Even after judgment, the surety on the bond may complain that the attachment is void; but not the main defendant. See Planters Bank *v.* Berry, 91 Ga. 266. The defendant in attachment has the right to appear and defend whether he enters special bail or not.
89 "Nor does it make any difference that the defendants are citizens of another State. The right of a citizen of another State to appear and answer in our courts of justice can not be questioned. Whether he will do so or not is for his determination. In some cases he loses nothing if he does not, for the judgment would not conclude him; in attachment, however, he must appear

and defend at his peril." Reid *v.* Moore, 12 Ga. 370. If he does not replevy, and makes only a special appearance to question the power of the court to issue the attachment, as was done in the case of Associated Press *v.* United Press, 104 Ga. 51, the court is not, when the special appearance is sustained, authorized to proceed further; for the process has proved ineffectual to bring the defendant into court. Bell *v.* New Orleans & Northeastern R. Co., 2 Ga. App., 58 S. E. 103 (5) and cit. But the filing of a general demurrer or an answer not under protestation, and without expressly reserving the special appearance, waives the special appearance. Lyons *v.* Planters Bank, 86 Ga. 485; Savannah Ry. Co. *v.* Atkinson, 94 Ga. 780; Pacific Selling Co. *v.* Albright-Prior Co., Ga. App., (59 S. E. 468). The defendant having, by filing a replevy bond, a demurrer, and an answer, submitted itself personally to the jurisdiction of the court, with the right to make only such defenses as it could have made if it had been personally served with process, and the surety on the replevy bond making no complaint against the judgment,
it becomes immaterial whether the levy of the attachment
90 was regular or not, or whether the property seized was subject to levy; and these questions are therefore not for decision. King *v.* Randall, 95 Ga. 449. The defendant had the right to replevy irrespective of whether the property was subject or not subject to the levy. Swift *v.* Tanner, 89 Ga. 660, 673.

2. While the defendant in attachment, by reason of the facts mentioned above, is precluded from saying that the court did not acquire jurisdiction of it so far as the question of sufficiency of the attachment and levy as a means of bringing it into court is concerned, it still had the right to urge every defense it might have urged if it had been brought into court by service of ordinary process; and therefore might plead that the court was without jurisdiction, because of the character of the suit or because it was brought in the wrong venue. Thompson *v.* Wright, 22 Ga., 607 (2). The trite old saying "catching before hanging" is sound in theory and in practice, but it is without applicability when there is a voluntary surrender into the hands of the court; the question of catching is over, but the prisoner may still question the authority of him who proposes to do the hanging. The question of jurisdiction and suability as applied to non-resident corporations is not so much one of citizenship as of finding. Reeves *v.* Southern Ry. Co., 121 Ga. 661 (49 S. E. 674, 70 L. R. A. 513); Bell *v.* New Orleans & Northeastern R. Co., *supra*. We now say again what we said by
91 way of obiter in the case of Pacific Selling Co. *v.* Albright-Prior Co., 2 Ga. App. (59 S. E. 468), that foreign corporations, though they do not transact business in this State, are subject to suit by attachment; and Civil Code, § 4527, which apparently restricts that remedy to foreign corporations which do transact business in this State, is cumulative and declaratory only, and was enacted to counteract the impression, which otherwise might prevail, that because such corporations, by transacting business in the State, became subject to suit *in personam*, they would not be subject to attachment. The point made by demurrer and plea, that the court

was without jurisdiction, because the contract was made and the cause of action accrued beyond the limits of the State and not in the county of Crisp, while properly before us for decision, is not well founded. The same point was before us in Lytle *v.* Southern Ry. Co., 2 Ga. App. (59 S. E. 595), and was decided adversely to the contention of the plaintiff in error.

3. As to the case on its merits, the plaintiffs proved that they delivered the stock to the defendant in good order, and that it was delivered at destination by the connecting carrier in bad order. They further proved that the defendant did not deliver to the next connecting carrier in good order, though they were not able to prove directly that all the damage occurred while the shipment was in the possession of the defendant. The defendant's only reply was to show the contract of shipment. Under the law of Kentucky, where the contract was made, it was void so far as it
92 attempted to vary the carrier's common-law liability, but it was valid so far as it specified that it undertook to carry the shipment only to the terminus of its own line and there deliver it to the connecting carrier. Ireland *v.* M. & O. R. Co., 105 Ky. 400; Pittsburg Ry. Co. *v.* Viers, 113 Ky. 526. In case of an entire loss of the goods, *prima facie* a presumption would arise that the initial carrier lost them. So. Ry. Co. *v.* Montag, 1 Ga. App. 649. In addition to the authorities cited in support of this proposition in the Montag case, see L. & N. R. Co. *v.* Jones, 100 Ala. 263, and Brintnall *v.* Ry. Co., 32 Vt. 665. The North Carolina Supreme Court, in the case of Meredith *v.* Ry Co., 137 N. C. 478, decides that the reason and the rule both hold good when applied to a case where the shipment is not entirely lost but is damaged in transit, and places upon the initial carrier the burden of showing that the injury did not occur while in its possession. The Massachusetts court (Farmington Co. *v.* Railway Co., 166 Mass. 154) and the Alabama court (L. & N. R. Co. *v.* Jones, 100 Ala. 263) hold that as to merely damaged shipments, the presumption does not arise against the initial carrier. The Alabama court places its decision upon the ground that the presumption in such cases is against the last carrier. The Supreme Court of Arkansas, while recognizing the general rule as announced by the Massachusetts and the Alabama courts in the cases just mentioned, held, in the case of St. Louis Ry. Co. *v.* Coolidge, 67 L. R. A. 555, that whenever it
93 is shown that the goods were partly damaged in the possession of the first carrier, it will be held liable for the whole damage, unless it can by proof shift all or a part of the liability to another. When goods are delivered to a bailee in good condition, the burden, for obvious reasons, is, and should be, on the bailee, to show that he redelivered them to the bailor or to the person or other bailee who is to receive them for the bailor under the contract. Now it may be logically consistent to hold, as did the Alabama court in the Jones case *supra*, that when it is shown that the goods were delivered by the original bailee, the initial carrier, to the next carrier and there is no proof as to the

condition of the shipment at that time, the law will presume that the goods were in good order, and that therefore the presumption against the first carrier is relieved: this on the theory that since a carrier is not bound to receive goods in bad order, it will be supposed that the second carrier would not have received them in bad condition. See Ohlen *v.* A. & W. P. R. Co., 2 Ga. App. (58 S. E. 511). But when there is proof that the shipment was already somewhat damaged before it left the custody of the first carrier, there can be no presumption that the second carrier received it in good order, and, as held by the Arkansas court in the Coolidge case, the burden remains upon the initial carrier of showing itself free from liability for each and every portion of the damage. The initial carrier in the case at bar offered no proof, and, the
94 amount of damage being uncontested, the court did not err in directing a verdict for the plaintiff. We may add that where a through contract of shipment is made, the burden is always on the initial carrier to show its freedom from fault, even though there be a valid contract that each carrier shall be responsible only for damage occurring on its own line; this for the reason stated in the Montag case, *supra*.

Judgment affirmed.

95 Court of Appeals of the State of Georgia.

ATLANTA, *January* 15, 1908.

The Honorable Court of Appeals met pursuant to adjournment. The following judgment was rendered:

CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RY. CO.

versus

PLESS & SLADE.

This case came before this court upon a writ of error from the city court of Cordele; and, after argument had, it is considered and adjudged that the judgment of the court below be affirmed.

Bill of costs, $10.00.

96 Court of Appeals of the State of Georgia.

ATLANTA, *February* 7, 1908.

I hereby certify that the foregoing pages hereto attached contain the complete record in the case of Cincinnati, New Orleans & Texas Pacific Ry. Co. *v.* Pless & Slade, which is forwarded to the Supreme Court of the United States by virtue of a writ of error allowed by Honorable B. H. Hill, Chief Judge of the Court of Appeals of the State of Georgia, on January 23, 1908, as appears from the records and files of this office.

Witness my signature and the seal of said court hereto affixed, the day and year first above written.

[Seal Court of Appeals of the State of Georgia, 1906.]

LOGAN BLECKLEY,
Clerk of the Court of Appeals of the State of Georgia.

Endorsed on cover: File No. 21,025. Georgia court of appeals Term No. 283. Cincinnati, New Orleans & Texas Pacific Railway Company, plaintiff in error, *vs.* J. Slade and E. M. Pless, composing the firm of Pless & Slade. Filed February 19th, 1908. File No. 21,025.

In The Supreme Court of The United States

OCTOBER TERM, 1908

No. 283 '79.

Office Supreme Court, U. S.
FILED.
MAY 11 1909
JAMES H. McKENNEY,
Clerk.

CINCINNATI, NEW ORLEANS AND TEXAS PACIFIC RAILWAY COMPANY,

Plaintiff in Error.

vs.

J. SLADE AND E. M. PLESS, COMPOSING THE FIRM OF PLESS & SLADE,

Defendants in Error.

ON WRIT OF ERROR FROM THE COURT OF APPEALS OF THE STATE OF GEORGIA

J. GORDON JONES

(WITH WHOM WAS D. A. R. CRUM ON THE BRIEF)

FOR

CINCINNATI, NEW ORLEANS AND TEXAS PACIFIC RAILWAY COMPANY

CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY CO., PLAINTIFF IN ERROR

vs

J. SLADE AND E. M. PLESS, COMPOSING THE FIRM OF PLESS & SLADE, DEFENDANT IN ERROR.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1908.

No. 283.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF GEORGIA

STATEMENT OF THE CASE.

An attachment was issued from a Notary Public, ex-officio justice of the peace, returnable to the City Court of Cordele, upon an affidavit of a member of the defendant in error firm, alleging an indebtedness to them by the plaintiff in error; and that it, the defendant in error "resides without the State of Georgia."

This attachment was levied upon a railroad box car, which, at the time, was engaged in interstate commerce, the same belonging to the plaintiff in error, and having been loaded with freight to be transported, as a through shipment, from Nashville, Tennessee, to Cordele, Georgia, under an agreement or arrangement that the same should be returned to the plaintiff in error by its connecting lines of railway, taking the same into Georgia, as more fully set forth in the pleadings and record of this case.

The plaintiff in error, for the purpose of releasing said car from the seizure thereof, executed a statutory bond. It is also entered in said City Court of Cordele, its special appearance and motion to quash the attachment, on the grounds therein stated. It also filed its plea to the jurisdiction of said Court, challenging the jurisdiction of the Court over the person of the plaintiff in error, and the subject matter, to-wit: The property attached, on the grounds stated therein, more fully appearing in the printed record. (Original, page 36; print 18.)

Demurrers to said special appearance, motion to quash and plea to the jurisdiction were filed by the defendant in error, as shown by the record,

(original, page 34, print 17—original page 46, print 23) which, after argument before the Court, were sustained on the grounds therein stated.

The cause proceeded to trial in said City Court of Cordele and, upon the coming in of all evidence, the Court directed a verdict, to be returned by the jury, in favor of the plaintiff, upon the declaration in attachment, filed by the defendant in error, and judgment of the Court was accordingly, duly entered up thereon. The case was taken upon Bill Exceptions, to the Court of Appeals of the State Georgia, where judgment of the lower court was affirmed, and writ of error was sued out to this Court.

The main questions involved in this writ of error are, that, whether or not a railroad car engaged in interstate commerce, belonging to a foreign railroad corporation, is subject to attachment under the laws of the State of Georgia, and also the question of whether or not a Kentucky contract for the transportation of an interstate shipment of goods, executed prior to the passage of the Act of Congress, familiarly known as the Hepburn Bill, is to be governed and controlled by the laws of the State of Kentucky, or by the Federal statutes.

These questions were raised by the special appearance of the plaintiff in error in the trial court, its motion to quash the attachment and its plea to the jurisdiction, so stricken, upon demurrer by the Bill of Exceptions to the Court of Appeals of the State of Georgia, from the judgment of said trial court.

Brief in Behalf of Plaintiff In Error. On Writ. In Error to the Court of Appeals of the State of Georgia.

I.

The Acts of Georgia 1855-6 page 33 codified in Code of 1895 Sec. 4527, providing for the writ of attachment against incorporations not incorporated by the laws of this State, who are transacting business within the State, is inoperative whenever such attachment amounts to a regulation of interstate commerce.

Constitution of the United States, Article I., Section 8:

> "The congress shall have power .....
> .....to regulate commerce with foreign nations and among the several States and with the Indian tribes."

Act of Congress approved June 15, 1866. (U. S. Compiled Statutes, 1901, Section 5258.)

> "Every railroad company in the United States, whose road is operated by steam, its successors and assigns, is hereby authorized to carry upon and over its roads, boats, bridges, and ferries, all passengers, Government supplies, mails, freight and property on their way from any State to another State, and to receive compensation therefor, and to connect with roads of other States so as to form continuous lines for the transportation of the same to the place of destination."

Act of Congress, approved February 4, 1887. (U. S. Compiled Statutes, 1901, page 3154.)

> "Section 1. That the provisions of this Act shall apply to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad or partly by railroad and partly by water when both are used under a common control, management or arrangement for a continuous car-

riage or shipment from one State or territory of the United States, or the District of Columbia, to any other State or territory of the United States, or the District of Columbia..... The term "railroad" as used in this act shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement or lease; and the term "transportation" shall include all instrumentalities of shipment or carriage. All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid or in connection therewith, or for the receiving, delivering, storage or handling of such property, shall be reasonable and just; and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful."

"Section 3. ..... Every common carrier subject to the provisions of this Act, shall according to their respective powers afford all reasonable, proper and equal facilities for the interchange of traffic between their respective lines and for the receiving, forwarding and delivering of passengers and property to and from their several lines and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines; but this shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business."

"Section 7. That it shall be unlawful for any common carrier subject to the provisions of this act to enter into any combination, contract, or agreement, expressed or implied, to prevent, by change of time schedule, carriage in different cars or by other means or devices, the carriage of freights from being continuous from the place of shipment to the place of destination; and no break of bulk,

stoppage, or interruption made by such common carrier shall prevent the carriage of freights from being and being treated as one continuous carriage from the place of shipment to the place of destination, unless such break, stoppage or interruption was made in good faith for some necessary purpose, and without any intent to avoid or unnecessarily interrupt such continuous carriage or to evade any of the provisions of this act."

A State, nor an officer of the State, has power to regulate or interfere with the interstate commerce, and that therefore the trial court in this case had no jurisdiction to seize and dispose of property engaged in interstate commerce. The Constitution of the United States gives Congress exclusive power over foreign and interstate commerce.

The Interstate Commerce Act. Secs. "3" & "6."

A common carrier is prohibited from making the carriage of freights being other than continuous.

The Interstate Commerce Act Sec. "7."

A common carrier is prohibited from making the carriage of freights being other than continuous.

The Interstate Commerce Act Sec. "7."

The Safety Appliance Act prescribe the character and equipment of cars that are received by one road from another in interstate commerce.

The Safety Appliance Act, Secs. "2" and "3."

II.

Both the Constitution of the United States and the laws of the United States indicate a clear determination upon the part of Congress to control, through the instrumentality of the Federal Government, all interstate commerce. The courts of the United States have followed this congressional action.

The Abeline case is a leading case on this question. The Mississippi case wherein it was held that the Mississippi Railroad Commission could not require an interstate train to stop at a particular point.

Texas & Pacific Railway Co. vs. Abeline Cotton Oil Co. 204 U. S. 246.

Gulf, etc., Railway Co. vs. Hefley. 158 U. S. 98.

In the Hefley case, the Supreme Court held that

a penalty to deliver cars to shippers was an interference with interstate commerce and illegal. Various cases of this kind can be found throughout the reports indicating not only that Congress has exclusive power over interstate commerce, but Federal courts can only determine questions arising therefrom.

Pacific Coast Lumber Manufacturing Association vs. Northern Pacific Railroad Company. 165. Fed. 1, and cases there cited.

ATTACHMENT OF CARS.

Jurisdiction of State Courts.

III.

The great weight of authority is to the effect that a car in use in interstate commerce is not subject to attachment under a state law.

Michigan Central R. R. Co. vs. Chicago & Michigan Lake Shore R. R. Co. 1. Ill. App. 399. (Appellate Court of Ill., 1879.)

Wall vs. Norfolk & Western Ry. Co. 44 S. E.

Rep. 294. (Supreme Court of Appeals of W. Va., 1903).

Connery vs. Quincy, Omaha & Kansas City Ry. Co. 99—N. W. Rep. 365. (Supreme Court of Minnesota, 1906.)

Davis vs. Cleveland C. C. & St. L. Ry. Co. 146 Fed. Rep. 403. (U. S. Circuit Court, N. D. of Iowa, 1906.)

Seibal vs. Northern Central Ry. Co. 61. S. E. Rep. 435. (Supreme Court of S. C., 1907.)

Shore vs. Baltimore & Ohio R. R. Co., 57. S. E. Rep. 526. (Supreme Court of S. C., 1907.)

In Connery vs. the Railway Company the court, referring to the interstate commerce act of 1887. says:

> "These well known provisions of law are expressive of a universal condition that exists upon all the railway lines of this country, and without giving them effect and permitting the railway carriers from other states to come into our boundaries with goods which are shipped here, and return without being

retarded, or so treated that the carriers to protect themselves from litigation away from home must transfer the contents of such cars to others at the state line, would be provocative of the greatest detriment to the business interest of our citizens, and be violative of the terms and spirit of the enactments to which we have referred. * * * * *

"While it was a part of the contract between the non-resident corporation in this state and the connecting carriers that the freight cars should be reloaded and within a reasonable time returned, this custom was but a practical method of securing compensation for bringing the car into and out of the state in the necessary effort for continuous and unbroken transit which is essential to the purposes of traffic and interstate commerce."

In Davis against the Railway Company the court holds that :

"The formation of continuous lines of trans-

portation, whereby each road, instead of remaining a separate line, becomes a part of a great railway system extending into all parts of the country, upon any part of which cars may be loaded with freight to be transported from one state to or through another, without unloading, to its destination on any part of the system, is authorized by Congress. This greatly subserves the public convenience, lessens the cost of transportation and delays in carriage, and to authorize cars while being so used to be seized upon attachment under authority of state laws at the suit of an individual would greatly inconvenience the public and directly interfere with interstate commerce and with the authority of Congress in providing for such continuous lines of transportation."

In Seibals against the Railway Company, the Supreme Court of South Carolina held:

"The tendency of seizure would be to cause the breaking of the bulk and transfer of such

> freight at state lines, whereas not only public policy but the spirit and provisions of the federal statutes require that interstate shipments shall go forward in continuous passage from the place of shipment to the place of destination. The right to go to the place of destination and unload without interruption involves the right to complete the transit of the car as an instrument of interstate commerce by an unterrupted return to the original situs, if done within a reasonable time in the usual course of such business."

The Supreme Court of the United States held in Johnson vs. Southern Pacific Company, 196 U. S. 1 (1904), that a dining car not in transit but waiting on a siding for the arrival of a train for use in interstate movement, is an instrument regularly used in moving interstate commerce, although it has stopped temporarily in making its trip between two points in different states. The question there arose in connection with the Act of Congress approved March 2, 1893, requiring cars engaged in interstate commerce to be equipped with automatic couplers.

This case has been followed in:

United States vs. P. C. C. & St. L. Ry. Co., 143 Fed. Rep. 360 (U. S. District Ct. S. D. of Ohio, 1905).

Davis vs. Cleveland C. C. & St. L. Ry. Co., Supra.

Seibals vs. Northern Central Ry. Co., Supra.

The only case in which it has been held that a a car engaged in interstate commerce may be attached under a state law is:

Southern Flour & Grain Co. vs. Northern Pacific Ry. Co., 56 S. E. Rep. 742 (Supreme Court of Georgia, 1907).

In that case, however, there was no discussion of the principles involved, the court merely refusing to follow the decisions in other jurisdictions.

IV.

The plaintiff in error had the right, under its contract with its connecting carriers, to send its cars with through shipments of freight into other

states and over lines of railway, as is set up in all parts of the pleadings in the lower court.

The power of congress under the commerce clause of the constitution is exclusive of state authority where the subjects upon which it is exerted are national in their character, and admit and require uniformity of regulations and affect alike all the states.

Any construction of the attachment laws of the state of Georgia which would have the effect of laying a burden upon interstate commerce, by preventing the plaintiff in error from sending its cars into the state of Georgia to perform interstate commerce by the carrying of through shipments of freight from one state into another and having its cars so sent to be returned either loaded or empty within a reasonable time, would not only nullify any contract that it may have with its connecting railway lines, but be a burden upon and a regulation of commerce between the states such as would fall within the inhibition of the commerce clause of the federal constitution.

It was long ago settled by the decisions of the Supreme court of the United States that all the means of transportation are within the protection

of the commerce clause of the federal constitution. The cars and all instrumentalities of a railway company are protected by that clause from unreasonable regulation by the states.

A construction of the attachment laws of Georgia which would result in destroying the rights of the plaintiff in error, under its contract and agreement with its connecting railway lines, according to the plan of car service rules adopted by The American Railway Association, governing settlement for the use of freight cars, would be a direct burden upon the plaintiff in error in the exercise of its duties as a public carrier of commerce between the states; and would render such laws violations of the commerce clause and regulations of interstate commerce.

Nor are the attachment Acts police regulations; nor can they be justified as police regulations.

It cannot be too strongly insisisted upon that the right of continuous transportation for freight and passengers from end of the country to the other is essential in modern times to that freedom of commerce between the states from the restraints

which the commerce clause of the Constitution is intended to secure.

Wabash, St. L. & P. R. Co. vs. Illinois, 118 U. S. 557.

V.

In the case of Johnson against the railway company, the Court held that a railroad has such an interest in and a right to use the car of a foreign company, whose lines are in another State, and that it cannot be compelled to surrender it as garnishee in an action of foreign attachment, and an attempted attachment does not give the Court jurisdiction.

Johnson vs Union Pacific R. R. Co., 69 Atl. 298;

Chalkley vs R. F. & P. R. R. 10 Va. Law Reg. 270 (July, 1904);

Elliot on Railroads Volume 1, p. 919 (2 Ed.);

Davis vs Cleveland C. C. & St. L. R. R. Co. 146 Fed. Rept. 403 (Supra);

In the case of Davis vs Cleveland C. C. & St. L. R. R. Co., 146 Fed. Rept. 403 a hasty searcher

might take the impression that the controlling question was one of jurisdiction of the person, diverse citizenship, that is to say in that view, the decision might be reconciled with the opinion of the Court of Appealsof Georgia in the case at bar.

In the opinion of the Court in Davis against Railway Company, the Court held:

> "Cars owned by a steam railroad company and delivered by it to other companies, loaded with freight to be used in the transportation of such freight over their lines to points of destination in other states, and then returned, within a reasonable time, either loaded or empty, to the owner in the State where received, pursuant to agreements between the companies for the continuous carriage of interstate shipments of freight, as authorized by Rev. St. Sec. 5258 (U. S. Comp. St. 1901 P. 3564), and in conformity to the policy of the statutes regulating interstate commerce, and are, until their return to the owner, instruments of interstate commerce, and are not subject to attach-

ment under the laws of a state into which they may be carried by such other companies."

"The validity of a law of the State, so far as it relates to, or may operate upon matters within the exclusive control of Congress, is determined by its effect upon such matters when enforced, and not by the purpose for which it may have been enacted."

It may be said, that Section 5258 Rev. St. (U. S. Comp. St. 1901 P. 3564) is permissive only, and does not impose any obligation upon carriers, of the class described, to enter into agreements, or, if agreements are made, does not relieve them from any liability to which they would otherwise be subject. But the question is: Are cars or other instrumentalities of the companies forming such continuous lines when used in interstate traffic, so used, pursuant to the authority of Congress? If they are, then, such use cannot be rightly burdened or interferred with by or under authority of State legislation.

Brown vs Maryland, 12 Wheat. 419, 6 L. Ed. 678;
McCulloch vs Maryland, 4 Wheat, 316, 4 L. Ed. 579;
Prigg vs Pennsylvania, 16 Pet. 539, 10 L. Ed. 1060;
Liesy vs Hardin, 135 U. S. 100, 10 Sup. Ct. 681, 34 L. Ed. 128;
Bowman vs Railway Co. 125 U. S. 465;
Easton vs Iowa, 188 U. S. 220.

The plain purpose of Section 5258, is an exercise by Congress of the power conferred upon it by the commerce clause of the Federal Constitution; and this it does by permitting the owners of connecting lines of steam railroads to arrange for the formation of continuous lines for the transportation of persons and property over their respective roads, from one State to, and through others, without change of cars, and to receive compensation therefor.

In Railroad Company vs Richmond, 19 Wall.

584, 23 L. Ed. 173, this section and the Act of July 25th, 1866, authorizing the construction of bridges over navigable waters were under consideration,

> "These Acts were passed under power vested in Congress to regulate commerce among the several states and were designed to remove trammels upon transportation between different states which had previously existed, and to prevent the creation of such trammels in future, and to facilitate railway transpartation by authorizing the construction of bridges over navigable waters of the Mississippi. But they were also intended to reach trammels interposed by State enactments or by existing laws of Congress."

In Bowman vs Railroad Company, 125 U. S., 465 and 485 Sup. Ct., 689, 31 L. Ed. 700, the Court, in referring to the same section, says:

> "So far as these regulations made by Congress extend, they are certainly indications of its intention that the transportation of

commodities between the states shall be free, except where it is positively restricted by Congress itself, or by the states in particular cases by the express permission of Congress. The subjects upon which Congress can act under this power are of infinite variety, requiring for their successful management different plans or modes of treatment. Some of them are national in their character, and admit and require uniformity of regulation, effecting alike, all the states; others are local. Of the former class may be mentioned, all that portion of commerce between the states which consists in the transportation, purchase, sale, and exchange of commodities. Here, there can of necessity, be only one system or plan of regulation, and that, Congress can alone prescribe. Its non-action in such cases with respect to any particular commodity or mode of transportation, is a declaration of its purpose that the commerce in that commodity or by that means of transportation shall be free. Commerce with foreign countries and among the states, strictly considered, consists in inter-

course and traffic, including in these terms, the transportation and transit of persons and property, as well, as the purchase, sale, and exchange of commodities for the regulation of commerce, as thus defined, there can only be one system of rules applicable alike to the whole country, and the authority which can act for the whole country can alone, adopt such a system."

VI

Opinion of the Court of Appeals of Georgia (Original Page 47; Print 92)

In which the Court held:

"Under the law of Kentucky, where the contract was made, it was void so far as it attempted to vary the carrier's common-law liability, but it was valid so far as it specified that it undertook to carry the shipment only to the terminus of its own line, and there deliver it to the connecting carrier."

It seems to be clearly good, that the Court of Appeals of Georgia erred in holding that the law of Lentucky controlled the contract in the case at bar. Section 20 of the Hepburn Act was not in force at the time this contract was made, and, therefore, the law of the United States, as announced by the Courts, was the law governing all contracts of interstate commerce, in so far as such contracts attempted to limit liability. There are a number of decisions by the Appellate and Supreme Courts, holding that, in interstate commerce, the carrier might limit his liability to a certain extent, at least, and also holding that a contract of interstate commerce was not governed by the laws of the State where made. The laws of the United States, as announced by the Courts, at the time the bill of lading was issued in this case, gave a certain privilege, right, and immunity to interstate carriers, which has been denied to the plaintiff in error by the Court of Appeals of Georgia in the case at bar. If these two points, as above made, are good, and it seems that they are, it does not make any difference whether the Georgia Courts had jurisdiction over the person or not. Not having jurisdiction over the subject matter,

any judgment rendered is erroneous and void.

The Motion to Quash the Attachment (original 25, print 13), Plea of Jurisdiction (original 36, print 18), Demurrer to Declaration on Attachment (original 53, print 27) and Answer to Declaration (original 54, print 28) raises the question:

> "Is a freight car, belonging to an Ohio public service, common carrier corporation, which is brought into the State of Georgia by another carrier company, loaded with interstate freight and unloaded by the consignee company, and is being loaded for the return trip, subject while thus empty or while being reloaded, to be seized under a process of attachment against a nonresident owner of the car, issued out of a Court in Georgia?"

The Motion to Quash the Attachment, Plea to Jurisdiction, and Answer to Declaration on Attachment, filed by defendant, in the lower Court (original 23, 13; 36, 18; 54, 28) in the State Court, fully sets out the facts upon which it claims that the car attached was not subject to attachment.

It is not necessary to enter upon a critical analysis of the authorities bearing on this question, because on the points next to be considered, the authorities all agree that this attachment cannot be upheld, and if they are to be relied upon, the motion to quash the attachment must be sustained and the attachment quashed. The stipulation of facts makes this an absolutely clear case of an attempt by the plaintiff to interfere with interstate commerce and the instrumentalities thereof by means of their writ of attachment.

Sec. 5258 Rev. St. of the U. S. (Comp. 1901 page 3564.)

VII.

Appearance, General or Special; Giving of Replevy Bond; Dissolving the Attachment; Converting Action in Rem Into Action in Personam.

Plaintiff in error, insists that the Court of Appeals of Georgia, erred in holding that:

> "The giving of a replevy bond was a general apperance by the defendant, dissolving the attachment and converting it from an action in rem into an action in personam * * * * *.
>
> "When the defendant has given bond and security, as provided in this Code, or when he has appeared or made defense by himself or attorney at law, or when he has been cited to appear, as provided in this Code, the judgment rendered against him in such case shall bind all his property, and shall have the same force and effect as when there has been personal service, and execution shall issue accordingly."

The defendant appeared in the lower Court specially (original 25 print 13) making special appearance by the filing in Court its Motion to Quash the Attachment. (Original 36 print 18) also filed its Plea to the jurisdiction of the Court. Should the giving of the replevy bond be held to constitute a general appearance, then a defendant would be deprived of any remedy or legal channel through which property could be released and the question of the jurisdiction of the Court out of which the attachment issued could be questioned and determined. The Motion to Quash was a special and not a general appearance. The objections to the jurisdiction was not a waiver on the part of the defendant; if the trial Court had and acquired no jurisdiction of the subject-matter, then the giving of a replevy bond and release of property seized under the writ of attachment would not, in itself, constitute a general appearance and thereby change the action from one in rem to an action in personam.

An appearance for the sole purpose of objecting to the jurisdiction of the Court does not constitute a general appearance.

(U. S. 1888) Holstead vs Manning, 34 Fed. 565;

(Mich 1873) McCaslin vs Camp, 26 Mich 390;
(Neb. 1895) South Omaha Nat. Bank vs Farmers & Merchant Nat. Bank. 45 Neb. 29; 63 N. W. 128;
(Ohio 1885) Elliot vs Lawhead, 43 Ohio St. 171; 1 N. E. 577;
(Or. 1896) Myers vs Brooks, 29 Or. 203; 44 Pac. 281.

Allegations in a plea in abatement, showing that the cause of action and the subject-matter of the suit did not have their origin in Ohio (such plea being presented solely to object to the jurisdiction of the Court, and to quash the return of service) do not amount to an appearance of the defendant.

(U. S 1886) United States vs American Bell Telephone Co., 29 Fed. 17.

Where a release bond is given after seizure of a vessel, under an invalid warrant of arrest, the claimant being then ignorant of such invalidity, the recital in such bond that the claimant and his surety personally appeared and submitted themselves to the jurisdiction of the Court, does not operate as an appearance to the suit and any proceedings founded thereon are coram non judice.

(U. S. 1893) Deas vs Berkeley, 58 Fed. 920.

A nonresident corporation, which cannot be served and which does not intend to become a party, is not to be considered as making a voluntary appearance, so as to justify the Court in making it a party to the record, merely because it assumes the defense of the suit for the actual defendant, pursuant to previous contract, and conducts the same by its own attorneys, and in part by witnesses which are under salary from it at the time of testifying.

(U. S. 1896) Bidwell vs Toledo Consol & St. Railway, (C. C.) 72 Fed. 10;
Grooch vs Jeter, 5 Ark. (5 Pike) 383;
Sawyers vs Smith, 41 Miss. 501;

A defendant may make an appearance by motion to dissolve an attachment, and such an appearance is not a general appearance. And likewise where a defendant appears and without questioning the merits of the action, or the truth of the grounds upon which the attachment issued moves to quash the attachment before it is levied for want of the jurisdictional facts to sustain it, he asks no relief, the granting of which would be in-

consistent with entire want of jurisdiction over the person and hence does not appear in the action so as to authorize the Court to proceed to judgment against him.

The giving of the replevy bond by the defendant was not an appearance for the reason that the giving of the bond and release of property seized under the writ of attachment did not in itself place the defendant in such an attitude whereby the defendant came into Court and took issue upon the petition or the grounds upon which the attachment was based. And the defendant did not waive any of its rights by the filing of the replevy bond whereby the action would convert into a personal one.

VIII.

Effect of Appearance by Giving Bond—Jurisdiction of Subject Matter.

It will be seen that, for the reasons heretofore given, the trial Court did not have jurisdiction of the subject-matter of the attachment. This being true, even if the giving of a replevy bond could be considered as a voluntary appearance, that would not confer jurisdiction of the Court over the subject matter.

"A voluntary or general appearance does not confer jurisdiction of the subject-matter of the suit."

> Cooper vs Reynolds, 10 Wall, 308, 19 L. Ed. 931;
>
> Atkins vs Fiber etc Co. 18 Wall, 272, 21 L. Ed. 844;
>
> Andrews vs Andrews, 188 U. S. 14, 47 L. Ed. 366, reaffirmed in Winston vs Winston, 189 U. S. 506, 47 L. Ed. 922;

Grace vs American Central Ins. Co. 109 U. S., 278. 27 L. Ed. 932;

Continental Life Ins. Co., vs Rhodes, 119 U. S. 237, 29 L. Ed. 388;

New England etc. Co. vs The Detroit etc. Co., 18 Wall. 307; 21 L. Ed. 846;

Creighton vs Kerr, 20 Wall 8, 22 L. Ed. 309;

Turner vs Bank, 4 Dall. 8; 1. L. Ed. 309;

Toland vs Sprague, 12 Pet. 300, 330; 9; L. Ed. 1093;

Empire etc. Trans. Co. vs Empire etc. Min. Co., 150 U. S. 159, 163; 37 L. Ed. 1037.

Where an inferior Court can have no jurisdiction of a case of law or equity, appearance does not cure the defect of judicial power, and it may be relied on by plea, answer, demurrer or at the trial or hearing.

Scott vs Sanford, 19 How 393, 474; 15 L. Ed. 691;

Rhode Island vs Massachusetts, 12 Pet. 657; 9 L. Ed. 133;

The appearance of one or both of the parties to a divorce proceeding cannot suffice to confer

jurisdiction over the subject-matter where it is wanting because of the absence of domicile within the State.

> Andrews vs Andrews, 188 U. S. 14-41, 47 L. Ed. 266; reaffirmed in Winston vs Winston, 189 U. S. 506, 47 L. Ed. 922;
> German Sav. etc. Society vs Dormitzer, 192, U. S. 125-128, 48 L. Ed. 373.

In Crittenden et al vs Darden et al, it was held:

> "The giving of a bond by a nonresident defendant for the release of property seized by process of foreign attachment, issued from a United States Court, is not a voluntary appearance, and does not give the Court jurisdiction."
>
> Crittenden et al vs Darden et al (2 Woods 437) 5 Fed. page 642.

In conclusion I submit that the appearance, made by defendant, was "special" which was made for certain purposes only, and did not extend to all the purposes of the suit.

I respectfully submit that the judgment of

the Court of Appeals of the State of Georgia, should be set aside, annulled and reversed, and this case remanded to the City Court of Cordele, with instructions to dismiss the same.

J. GORDON JONES,

Attorney for Plaintiff In Error.

Post Office Address, Cordele, Ga.

Supreme Court, U. S.
FILED
JAN 12 1910
JAMES H. McKENNEY,
Clerk.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 79.

CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY CO., PLAINTIFF IN ERROR,

vs.

J. SLADE AND E. M. PLESS, COMPOSING THE FIRM OF PLESS & SLADE, DEFENDANTS IN ERROR.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF GEORGIA.

BRIEF FOR DEFENDANTS IN ERROR.

J. T. HILL,
Attorney for Defendants in Error.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 79.

CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY CO., PLAINTIFF IN ERROR,

vs.

J. SLADE AND E. M. PLESS, COMPOSING THE FIRM OF PLESS & SLADE, DEFENDANTS IN ERROR.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF GEORGIA.

STATEMENT OF THE CASE.

An attachment was issued in accordance with the provisions of section 4510 of the Code of Georgia of 1895, on the ground that "the debtor resides out of the State," in favor of Pless & Slade, who are hereinafter referred to as creditor, against the Cincinnati, New Orleans & Texas Pacific Railway Co., who are hereinafter referred to as debtor, and was on the 11th day of May, 1907, duly levied upon a freight car belonging to the debtor, and returned to the City Court of Cordele.

On the — day of May, 1907, the debtor filed in the City Court of Cordele a replevy bond, as provided by section 4567 of the Code of Georgia, 1895.

At the June term, 1907, of the City Court of Cordele, creditor filed declaration in attachment in accordance with section 4556 of the Code of Georgia, 1895.

Debtor filed in said court its motion to quash the attachment on the ground that the City Court of Cordele had no jurisdiction of said cause, for the reason that the freight car attached was an instrument of interstate commerce, and that the seizure of such car was in violation of the Constitution of the United States, article 1, section 8: "The Congress shall have power * * * to regulate commerce with foreign nations and among the several States and with the Indian tribes," and amounted to a "regulation of interstate commerce."

In making such motion debtor stated that its appearance was special for that purpose only.

But, at the same term, and at the same time, debtor also filed its plea to the jurisdiction of said City Court of Cordele setting up practically the same contention, and not reserving any of its rights under its special appearance to make the motion to quash.

And, at the same term, and the same time, debtor filed its demurrer to creditor's declaration in attachment, which demurrer brought into question the merits of creditor's case, and in filing said demurrer debtor did not reserve any of its rights under the special appearance for the purpose of making the motion to quash.

And at the same term, and the same time, debtor also filed its answer to creditor's suit, not reserving any of its rights under its special appearance for the purpose of making the motion to quash.

On August 7, 1907, during said June term, 1907, of said City Court there came on to be heard the demurrers filed by the creditor to the debtor's motion to quash, and debtor's plea to the juri-diction, and the debtor's answer to the declaration in attachment, all of which demurrers were sustained by the court.

On said date there also was heard debtor's demurrer to creditor's declaration in attachment, which demurrer was overruled by the court.

At the August term, 1907, of the City Court of Cordele the case proceeded to trial and a verdict of the jury was had in favor of the creditor against the debtor, and the case was taken by bill of exceptions to the Court of Appeals of Georgia, and, the Court of Appeals having affirmed the rulings and findings of the City Court of Cordele, the case is here on a writ of error for review.

In the brief filed in this court by counsel for debtor no reference is made in their statement of the case to the fact that in the City Court of Cordele the debtor filed a demurrer to the creditor's declaration in attachment bringing in question the merits of said case, and also filed an answer to the creditor's declaration in attachment, and appeared and participated in the trial of the case on its merits before the jury.

BRIEF IN BEHALF OF "CREDITOR," DEFENDANT IN ERROR.

1st.

Effect of Appearance by Giving Bond or Making Defense.

Code section 4575, Code of Georgia, 1895:

> "When the defendant has given bond and security as provided in this Code, or when he has appeared and made defense by himself or attorney at law * * * the judgement rendered against him in such case shall bind all his property, and shall have the same force and effect as when there has been personal service."

Therefore the giving of the replevy bond and the filing of the demurrer and answer and the appearance and defense of said cause by the debtor's attorneys was such an appearance of the debtor as waived all questions of jurisdiction: it resulted in converting the attachment from an action *in rem* to an action *in personam*.

Thompson *vs.* Wright, 22 Ga., 607.
Walters *vs.* Kierstead, 74 Ga., 19.
King *vs.* Randall, 95 Ga., 449.
Woodbridge *vs.* Drought, 118 Ga., 671.

The giving of a replevy bond is judicial admission of notice equivalent in effect to acknowledgment or waiver of personal service.

Camp *vs.* Cohn, 53 Ga., 558.
De Leon *vs.* Heller, 77 Ga., 742.

If the attachment is for any reason subject to dismissal the lien acquired by the levy fails and the surety in the replevy bond is discharged, but "the attachment, whether good or bad, brings the defendant into court if he is served with notice, or if he appears and defends, or if he replevies the property, and he remains in court though the attachment be dismissed."

Bruce *vs.* Conyers, 54 Ga., 678-680.

The debtor, if he appears and defends, does so at his peril.

Reid *vs.* Moore, 12 Ga., 370.

Associated Press *vs.* United Press, 104 Ga., 51.

Bell *vs.* N. O. & N. E. R. R. Co., 2d Ga. App., 812, hn. 5 (S. E., 103).

The filing of a general demurrer, or an answer, not under protestation, and without expressly reserving a special appearance, waives the special appearance.

Lyons *vs.* Planter's Bank, 86 Ga., 485.

Savannah Ry. Co. *vs.* Atkinson, 94 Ga., 780.

Pacific Selling Co. *vs.* Albright-Prior Co., 3d Ga. App., 138 (59 S. E., 468).

The defendant having, by filing a replevy bond and demurrer and an answer, submitted itself personally to the jurisdiction of the court, with the right to make only such defense as it could have made had there been personal service by process, it becomes immaterial whether the property seized was subject to levy.

Kind *vs.* Randall, 95 Ga., 449, *supra*.

In addition to the authorities above cited upon this point, I desire to call the court's special attention to the able opin-

ion of Justice Powell, of the Court of Appeals of Georgia, contained in the record of this case, pages 45-48, print.

The record shows that the action was commenced by attachment and service had by publication. So far the action was in the nature of a proceeding *in rem* and would bind only the property attached; but afterwards, as the record also shows, the defendant voluntarily appeared and submitted himself to the jurisdiction of the court. He at first filed a demurrer, then an answer, and finally went to trial on the issues made by the pleadings. After judgment he moved for a new trial, which was overruled. If these statements appearing in the record are true, the court did have jurisdiction of the person of the defendant, and could bind him by a judgment. No evidence was introduced to contradict the record. Its truth is therefore presumed.

Maxwell *vs.* Stewart, 21 Wall., 71; 22 Wall., 77.

An appearance to file a demurrer to the complaint on the grounds that the court has no juri-diction, and that the complaint does not set out a cause of action, is a general demurrer to the merits and waives all defects in service and all special privileges of the defendant in respect to the particular court in which the action is brought.

St. Louis & S. F. R. R. Co. *vs.* McBride, 144 U. S., 127.

Appearing by counsel and moving to dismiss the bill for want of jurisdiction, and also for want of equity, is a waiver of a non-resident's privilege and amounts to a voluntary appearance.

Jones *vs.* Andrews, 10 Wall., 327.

Parties who enter a special appearance, and file motions to dismiss for want of jurisdiction and want of equity, and to discharge a receiver and dissolve a temporary injunction for want of jurisdiction, and because it was issued in term time, without requiring complainant to give bond, must be *held* to have appeared generally.

Edgell *vs.* Felder, 84 Federal, 69; 28 C. C. A., 382.

A special appearance for the purpose of objecting to the jurisdiction becomes general if the defendant then disputes the merits of the cause, and no words of reservation can make an appearance special which is in fact to the merits.

Crawford *vs.* Foster, 84 Fed., 939; 28 C. C. A., 576.

It will be seen from the authorities above cited that when the debtor appeared in the City Court of Cordele and filed a replevy bond for the property attached, and also filed its plea to the jurisdiction of such City Court, and also filed its demurrer and answer to creditor's declaration, not reserving unto itself the benefits of its special appearance, and also appeared and participated in the trial of the merits of the case before the jury, that such court obtained jurisdiction of the person of the debtor, and such action was converted from an action *in rem* to an action *in personam*. Such conduct on the part of the debtor waived all of its rights under its special appearance, and was a waiver of whatever question it might have made on the ground that the property attached was exempt from *levy, as an instrument of interstate commerce*.

Counsel for debtor in their brief contend, "a voluntary or general appearance does not confer jurisdiction of the subject-matter of the suit"—page 33. I reply *that the at-*

tachment was simply the means of bringing the debtor into court, and that when the debtor appeared, as hereinbefore set out, the question of jurisdiction was waived. The subject-matter of this suit was damages caused by the negligent handling of a shipment of live stock by the debtor, *and was not the car attached*.

The divorce cases cited by counsel for debtor are not applicable to the facts of this case.

Again counsel for debtor insists that its appearance was special for a certain purpose only, but in the brief filed they fail to mention the fact that they filed a demurrer, which questioned the merits of the creditor's declaration; that they filed an answer, and participated in the trial of the merits of the case before the jury, without reserving any of their rights under a special appearance.

I insist that there is no question in this case involving any statute of the United States, or any right under any statute of the United States, and that this court has no jurisdiction of this case, and that the writ of error should be dismissed.

Was the Seizure of the Car a Regulation of Interstate Commerce?

It will appear from the pleadings that the car seized under the attachment was the property of the creditor, and commenced its interstate trip at the city of Nashville (not on the line of the creditor company), and was loaded and transported by the N. C. & St. L. Ry. Co. and delivered to the C. of Ga. Ry. Co., and by the C. of Ga. Ry. Co. delivered to the G. S. & F. Ry. Co., with a cargo to be transported from Nashville, Tenn., to Cordele, Ga. Upon arrival at Cordele

it was delivered to the A. B. & A. R. R. Co., where the same was unloaded and the interstate cargo discharged. I contend, therefore, that the car had ceased to be an instrument of interstate commerce, and its seizure could not possibly amount to a *regulation of interstate commerce*.

Gulf Col. & Santa Fe Ry. Co. *vs.* Texas, 204 U. S., 403.

In this case the court holds:

> "An interstate shipment (in this case a carload lot), on reaching the point specified in the original contract of shipment ceased to be an interstate shipment, and its further transportation to another point within the same State on order of the consignee, is controlled by the laws of the State, *and not by the Interstate Commerce Act.*"

It would seem, as a matter of course, that if the contents of the car *ceases to be an interstate* shipment that the *car moving the shipment could not be said to be engaged in interstate commerce.*

If the car of the creditor company had been seized prior to the discharge of its interstate cargo it would come within the rulings of some of the decisions cited by counsel for the creditor company, but when it appears that the interstate cargo had been discharged it would seem that the car would also cease to be an instrument of interstate commerce.

Sou. Flour & Grain Co. *vs.* Northern Pacific Ry. Co., Supreme Court of Ga., 56 S. E. Rep., 742; 127 Ga., 626.

Sou. Ry. Co. *vs.* Brown *et al.*, Supreme Court of Ga., March Term, 1908, 131 Ga., 245.

If a thing attempted is in pursuance of a valid State law, its enforcement will not be stayed, because it may *incidentally affect interstate commerce*. In order to come within that clause of the Constitution of the United States conferring upon Congress the power to *regulate interstate commerce*, the thing attempted must amount to a *regulation* "and not merely an *incidental in reference*."

In the case of the Southern Grain Co. *vs.* Northern Pacific, above cited, Mr. Justice Atkinson, of the Supreme Court of Georgia, says—

> "to hold otherwise would in effect be to render immune from payment of debts all property of railroads employed in interstate traffic. Such a proposition does not rest upon sound reason."

Respectfully submitted.

J. T. Hill,
Attorney for Defendant in Error.
Post-office Address, Cordele, Ga.

Service of the above and foregoing brief hereby acknowledged.

Crum & Jones,
Attorneys for Plaintiff in Error.